SHDKT PROCEEDINGS AND ORDERS DATE: [01/17/96]

CASE NBR: [94109323] CFX STATUS: [DECIDED]
SHORT TITLE: [Lawrence, Alexis, etc.]
VERSUS [Chater, Commr., Social Sec.] DATE DOCKETED: [051895]
PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	May 18 1995	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Jun 16 1995		Order extending time to file response to petition until July 19, 1995.
5	Jul 18 1995		Order further extending time to file response to petition until August 18, 1995.
6	Aug 17 1995		Brief of respondent Donna E. Shalala, Sec. HHS filed.
7	Aug 24 1995		DISTRIBUTED. September 26, 1995 (Page 109)
9	Oct 2 1995		REDISTRIBUTED. October 6, 1995 (Page 23)
11	Oct 10 1995		REDISTRIBUTED. October 13, 1995 (Page 13)
13	Oct 23 1995		REDISTRIBUTED. October 27, 1995 (Page 21)
14	Oct 24 1995		Letter form Solicitor General received and distributed.
15	Oct 30 1995		REDISTRIBUTED. November 3, 1995 (Page 12)
17	Nov 6 1995		REDISTRIBUTED. November 9, 1995 (Page 13)
19	Nov 17 1995		REDISTRIBUTED. November 22, 1995 (Page 26)

Last page of docket

SHDKT PROCEEDINGS AND ORDERS DATE: [01/17/96]

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PAGE: [02]

	DATE	NOTE	PROCEEDINGS & ORDERS
21	Nov 27 1995		REDISTRIBUTED. December 1, 1995 (Page 19)
23	Dec 4 1995		REDISTRIBUTED. December 8, 1995 (Page 13)
25	Jan 2 1996		REDISTRIBUTED. January 5, 1996 (Page 41)
28	Jan 8 1996		Petition GRANTED. Judgment VACATED and case REMANDED Concurring opinion by Justice Stevens. Opinion concurring and dissenting by the Chief Justice. Dissenting opinion by Justice Scalia with whom Justice Thomas joins. Opinion per curiam.

****

EDITOR'S NOTE

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ORIGINAL

No. 94-9323

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

October Term 1994

ALEXIS LAWRENCE, on behalf of KEMMERLYN D. LAWRENCE, a minor,

Petitioner,

v.

DONNA SHALALA, Secretary, Health and Human Services,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION OF WRIT OF CERTIORARI

Carl L. Tilghman
Counsel of Record
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LIBERTY LEGAL SERVICES
1111 East Main Street ◆ Richmond, VA 23219 ◆ (804) 643-6054

20 pp

QUESTION PRESENTED FOR REVIEW

Whether the Trial Court's application of North Carolina law with the Social Security Act in denying the Petitioner benefits of a deceased wage earner under the Social Security Act violates the Petitioner's constitutional right to due process and equal protection of the laws of the United States of America under the Fifth and Fourteenth Amendments to the Constitution of the United States.

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IN THE SUPREME COURT OF THE UNITED STATES

_____TERM, 1995

ALEXIS LAWRENCE, on behalf of

KEMMERLYN D. LAWRENCE, a minor,

PETITIONER,

VS.

DONNA SHALALA

SECRETARY OF HEALTH AND HUMAN SERVICES,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Alexis Lawrence, on behalf of Kemmerlyn D. Lawrence, a minor, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on February 21, 1995.

OPINION BELOW

On February 21, 1995, the United States Court of Appeals for the Fourth Circuit entered its opinion affirming the judgment of the Honorable James C. Fox, Chief District Judge, United States District Court, Eastern District of North Carolina. A copy of the February 21, 1995 opinion is attached as Appendix "A".

JURISDICTION

On February 21, 1995, The United States Court of Appeals for the Fourth Circuit entered its opinion affirming the judgment of the trial court which denied the Petitioner benefits as a child of a deceased wage earner under the provisions of the Social Security Act, 42 U.S.C. Section 401, et. seq. Judicial review is authorized pursuant to Title 42, U.S.C. Section 405(g).

Appeal to the United States Court of Appeals for the Fourth Circuit is authorized by Title 28 U.S.C. 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

5TH AMENDMENT: No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.

14th AMENDMENT: Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and

of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person with its jurisdiction the equal protection of the laws.

UNITED STATES CODE

Title 42 U.S.C. Section 416(h)(2)(A): In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this title (42 U.S.C. Section 401 et. seq.), the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

NORTH CAROLINA GENERAL STATUTES

N.C.G.S. 49-14 (a) The paternity of a child born out of wedlock may be established by civil action at any time prior to such child's eighteenth birthday. A certified copy of a certificate of birth of the child shall be attached to the complaint. Such establishment of paternity shall not have the effect of legitimation.

(b) Proof of paternity pursuant to this section shall

be by clear, cogent, and convincing evidence.

(c) No such action shall be commenced nor judgment entered after the death of the putative father.

(d) If the action to establish paternity is brought more than three years after the birth of a child, paternity shall not be established in a contested case without evidence from a blood or genetic marker test.

(e) Either party to an action to establish paternity may request that the case be tried at the first session of the court after the case is docketed, but the presiding judge, in his discretion, may first try any pending case in which the rights of parties or the public demand it.

N.C.G.S. 29-19(b) For the purposes of intestate succession, an illegitimate child shall be entitled to take by, through or from:

(1) Any person who has been finally adjudged to be the father of such child pursuant to the provisions of G.S. 49-1 through 49-9 or the provisions of G.S. 49-14 through 49-16;

(2) Any person who has acknowledged himself during his own lifetime and the child's lifetime to be the father of such child in a written instrument executed or acknowledged before a certifying officer named in G.S. 52-10(b) and filed during his own lifetime and the child's lifetime in the office of the Clerk of Superior Court of the county where either he or the child resides.

Notwithstanding the above provisions, no person shall be entitled to take hereunder unless he has given written

notice of the basis of his claim to the personal representative of the putative father within six months after the date of the first publication or posting of the general notice to creditors.

STATEMENT OF THE CASE

This case was filed by summons and complaint on July 7, 1993, seeking judicial review of the decision of the Appeals Council, Social Security Administration, Department of Health and Human Services dated May 7, 1993, which denied survivor's benefits of a deceased wage earner to the petitioner. The Respondent Secretary filed answer admitting essentially all of the facts alleged in the complaint but concluding as a matter of law that the decision of the Appeals Council was correct. The Trial Court heard the case on Cross Motions for Judgment on the Pleadings filed by both parties. An order was entered on May 17, 1994, by the Honorable James C. Fox, United States District Court Judge, which upheld the decision by the Secretary and denied Petitioner's Motion for Judgment on the Pleadings.

Petitioner filed timely appeal to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals entered the decision on February 21, 1995, affirming the order of the Trial Court.

The essential facts necessary for a determination of this matter have been determined by the Administrative Law Judge at the hearing held on February 26, 1992, and are as follows:

1. Petitioner's father, Frank A. Lewis, Jr., SSAN 245-59-6557, died a fully insured individual under the Social Security Act on August 10, 1990.

2. Frank A. Lewis, Jr. has been determined to be the biological father of the Petitioner by the decision of the Administrative Law Judge supported by overwhelming evidence and proven beyond a reasonable doubt upon hearing of the Petitioner and all other parties in interest.

3. The Petitioner, by her guardian, brought an action in Carteret County, North Carolina, District Court, to establish paternity of the deceased wage earner, Frank A. Lewis, Jr. Prior to a final adjudication of that case, the wage earner was killed in a work related accident on August 10, 1990.

4. The wage earner did not acknowledge paternity in writing before his death, nor did the Petitioner live with or was supported by the wage earner prior to his death.

5. The blood grouping and DNA tests that were entered into evidence before the Administrative Law Judge were obtained at the wage earner's request in the civil paternity action prior to his death and established to a 99.99% degree of certainty that the deceased wage earner was the father of the Petitioner.

6. The mother of the Petitioner testified at the administrative hearing that she had had sexual relations with the deceased wage earner twice during the period of time when the Petitioner was conceived and she had no other

sexual relations with anyone else at that time.

7. But for the provisions of North Carolina General Statute, Section 49-14, preventing the entry of any judgment in a paternity case after the death of the putative father, the deceased wage earner, Frank A. Lewis, Jr., would have been declared the father of the Petitioner and an order of paternity would have been entered. The Administrative Law Judge determined that the evidence of record and the testimony of witnesses who would have also testified in the civil paternity action established beyond a reasonable doubt that the wage earner, Frank A. Lewis, Jr. was the father of the Petitioner, Kemmerlyn D. Lawrence

REASONS FOR GRANTING THE WRIT

In accordance with Rule 10.1 (a) of the Supreme Court Rules, Petitioner contends that the decision of the United States Court of Appeals for the Fourth Circuit in this case is in direct conflict with decisions of the same matter by the United States Court of Appeals for the Eleventh Circuit. On page 4 of the opinion of the United States Court of Appeals for the Fourth Circuit filed in this case (Appendix "A") the Court stated.

> "There can be little doubt that if this case had arisen in the neighboring Eleventh Circuit [the Appellant] could recover Social Security benefits under 42 U.S.C. 416 (h)(2)(A) as a child entitled to intestate distribution from his deceased father's estate." (emphasis added) "Nevertheless, as the Secretary points out, recovery of benefits in the Fourth Circuit is barred by Jones v. Schweiker, ... Jones, in contrast to Handley, holds

that even if a state intestacy statute is unconstitutional, the illegitimate child is not entitled to benefits."

The Eleventh Circuit's view of this matter also seems to be the view adopted by the Fifth Circuit Court of Appeals in Cox v. Schweiker, 684 F2d 310 (5th Cir. 1981) and the Eight Circuit Court of Appeals in Gross v. Harris, 664 F2d 667 (8th Cir. 1981). Counsel submits that because of the constitutionally impermissible inequity between the Petitioner and other children in the same circumstances who reside in Eleventh, Fifth or Eighth Circuit, this matter should be heard by this Court and a uniform ruling established so that all children are treated equally under the law.

CONCLUSION OF LAW

Because of the clear split of decisions between the Fourth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals, and the importance of the federal question presented, Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

Dated: April 27, 1995

Carl L. Tilghman
Attorney for Petitioner
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Beaufort, North Carolina 28516
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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ALEXIS LAWRENCE, Guardian and next friend on behalf of Kemmerlyn D. Lawrence, a minor,
Plaintiff-Appellant,

and

KEMMERLYN D. LAWRENCE, a minor,
Plaintiff,

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,
Defendant-Appellee.

No. 94-1812

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
James C. Fox, Chief District Judge.
(CA-93-100-CIV-4-F)

Submitted: December 13, 1994

Decided: February 21, 1995

Before WILKINS, HAMILTON, and MICHAEL, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Carl L. Tilghman, Beaufort, North Carolina, for Appellant. Janice McKenzie Cole, United States Attorney, Barbara D. Kocher, Special

Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Appellant, by and through her guardian, appeals the district court's grant of judgment on the pleadings to the Secretary on Appellant's action for surviving child's benefits pursuant to the Social Security Act, 42 U.S.C.A. § 416(h)(2)(A) (West 1991) ("the Act"). Finding no error, we affirm.

I

Appellant's father ("the insured") died in August 1990, in a work-related accident. Prior to the insured's death, the Appellant instituted a civil action in North Carolina to establish that the insured was Appellant's biological father. Blood testing of the insured, Appellant, and Appellant's mother established paternity with a 99.98% probability. Subsequent DNA tests established paternity with a 99.99% probability. The insured died before the North Carolina court rendered a final decision on the merits. Because North Carolina law prohibited entry of judgment in a paternity action after the death of the putative father, Appellant voluntarily dismissed this action. The insured did not acknowledge paternity in writing prior to his death, he did not live with the mother, and he had not contributed to Appellant's welfare.

Thereafter, Appellant filed an application for surviving child's benefits under the Act. The Secretary denied the application, and Appellant obtained review before an administrative law judge ("ALJ"). After a hearing, the ALJ found that paternity was established beyond a reasonable doubt and that Appellant was entitled to surviving

child's benefits under the Act. Although the Appeals Council agreed that substantial evidence supported the ALJ's paternity finding, it reversed the benefits award because Appellant had not satisfied entitlement to benefits under any provision of the Act. Appellant then filed a complaint in district court challenging the denial of benefits. The district court granted the Secretary's motion for judgment on the pleadings, and Appellant timely appealed.

II

The Social Security Act provides monthly benefits to minor children of deceased Social Security wage earners if they qualify, under the statutory definition, as dependents. An applicant who can show that she is entitled to inherit the insured's personal property under the intestacy laws of the state in which the insured was domiciled at the time of his death, is entitled to surviving child's benefits. 42 U.S.C.A. § 416(h)(2)(A) (West 1991).

Appellant argues that she is entitled to benefits because she should be entitled to inherit from the insured under North Carolina's intestacy laws.* An illegitimate child may inherit from her father in North Carolina only if paternity is established by a judgment entered *prior* to the father's death or by a written, notarized acknowledgement executed during the lifetime of both father and child. N.C. Gen. Stat. §§ 29-19; 49-14 (1984) (emphasis added). Hence, because paternity was not established prior to the insured's death, Appellant is not entitled to inherit under North Carolina law, and is not eligible for surviving child's benefits under the Social Security Act.

Appellant argues that this result is unduly harsh and clearly violative of the Equal Protection Clause. Appellant argues that North Carolina's intestacy laws unconstitutionally discriminate against the illegitimate children of deceased parents. To support her proposition, Appellant cites to an Eleventh Circuit case, *Handley v. Schweiker*, 697 F.2d 999 (11th Cir. 1983). In *Handley*, the Secretary denied an illegitimate child benefits because, like the present case, Alabama's statutory scheme required an adjudication of paternity during the

*Appellant concedes that she is not eligible under the other statutory provisions of the Act.

father's lifetime. *Id.* at 1001. The court held that Alabama's intestacy statute violated equal protection as applied because it made the status of illegitimacy an insurmountable obstacle to Handley's receipt of benefits. *Id.* at 1006.

As Appellant concedes, however, this Court has considered the issue and rejected the Eleventh Circuit's analysis. In *Jones v. Schweiker*, 668 F.2d 755 (4th Cir. 1981); *vacated sub. nom. Jones v. Heckler*, 460 U.S. 1077 (1983), we held that where a state statutory intestacy scheme resulted in an illegitimate child's inability to inherit from the insured, regardless of that statute's constitutionality, the child was not eligible for benefits under the Social Security Act. *Id.* at 759. We based our decision on *Mathews v. Lucas*, 427 U.S. 495 (1976), in which the Supreme Court "upheld treatment of a child born out of wedlock [that was] less favorabl[e] than those whose parents had regularized their relationships for purposes of determining whether they met the 'dependency' requirements of the social security act. It was held to be proper, or at least not impermissibly discriminatory, to condition entitlement upon 'dependency' at the time of death." *Jones*, 668 F.2d at 759 (citing *Mathews*, 427 U.S. at 507).

We subsequently reaffirmed our holding in *Parsons for Bryant v. Health & Human Servs.*, 762 F.2d 1188 (4th Cir. 1985). Like the present case, the Appellant in *Parsons* relied on Eleventh Circuit precedent to argue that North Carolina's inheritance barrier imposed on an illegitimate child whose father dies prior to an adjudication of paternity was unconstitutional. We again rejected that argument in the social security context stating:

> There can be little doubt that if this case had arisen in the neighboring Eleventh Circuit, [the Appellant] could recover Social Security benefits under 42 U.S.C. § 416(h)(2)(A) as a child entitled to intestate distribution from his deceased father's estate. Nevertheless, as the Secretary points out, recovery of benefits in the Fourth Circuit is barred by *Jones v. Schweiker*, ... *Jones*, in contrast to *Handley*, holds that even if a state intestacy statute is unconstitutional, the illegitimate child is not entitled to benefits.

Id. at 1190.

Appellant concedes that the current law in this Circuit bars her recovery of benefits. Accordingly, she asks this Court to reverse our precedent because of the unduly harsh result in her case. We decline to do so, however, because we have already engaged in an extensive review of the basis for our prior holdings. In *Jones*, we found that the "thrust" of the Social Security Act was to provide benefits to any child found to be dependent, and 42 U.S.C. § 416(h)(2)(A) was adopted to extend the means by which a child could establish this dependency after the insured's death. *Jones*, 668 F.2d at 760. To this end, § 416(h)(2)(A) aimed to extend benefits "where state law affirmatively showed that the legislature had concluded that there were factors making a dependency relationship probable, despite the absence of the regularizing aspects of marriage of the parents or other events linking the child to the parent." *Id.*

We stated further that Congress intended § 416(h)(2)(A) to extend the additional eligibility ground through application of state intestacy laws to the extent that the state legislature intended eligibility. *Id.* at 761 n.17. "It was not the purpose of the adoption of [§ 416(h)(2)(A)] to abide by imperatives, federal and constitutional in nature, which would nullify and contradict the law the [state] legislature wanted to make applicable." *Id.* Even if direct application of those state laws in denying intestacy inheritance might violate equal protection, this was not a reason to conclude that Congress intended to confer social security benefits beyond the limits intended by state legislatures.

This Court's review of a final decision regarding social security benefits is limited to ascertaining if the Secretary's findings are supported by substantial evidence and whether the correct law was applied. 42 U.S.C. § 405(g) (1988); *Hays v. Sullivan*, 907 F.2d 1453, 1456 (4th Cir. 1990). "Supported by substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Because we find substantial evidence supports the Secretary's findings and that the correct law was applied, we affirm the district court's order. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

Appendix "B"

FILED

MAY 19 '94

DAVID W. DANIEL, CLERK
U.S. DIST. COURT
E.D. N.C.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
NEW BERN DIVISION

No. 93-100-CIV-4-F

ALEXIS LAWRENCE o/b/o KEMMERLYN D. LAWRENCE, Plaintiff,

v.

DONNA E. SHALALA, Secretary of Health and Human Resources, Defendant.

ORDER

For the reasons set forth in the defendant's Memorandum in Support of the Secretary's Decision, the defendant's Motion for Judgment on the Pleadings is ALLOWED, the plaintiff's Motion for Judgment on the Pleadings is DENIED, and the Secretary's decision is AFFIRMED because substantial evidence supports that decision. As plaintiff acknowledges, the law in this circuit is against her. This court is without authority to revisit the seemingly harsh rule of decision of the Fourth Circuit Court of Appeals in Parsons for Bryant v. Health and Human Services, 762 F.2d 1188, 1190 (4th Cir. 1985) (even if a state intestacy statute is unconstitutional, illegitimate child in particular circumstance not entitled to child's insurance benefits under provisions of 42 U.S.C. § 416(h)(2)(A)).

SO ORDERED. This 17th day of May, 1994.

JAMES C. FOX
United States District Judge

I certify the foregoing to be a true copy of the original.
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina
By Margaret M. Bate
Deputy Clerk

AO 450 (Rev. 5/85) Judgment in a Civil Case

FILED

MAY 19 '94

DAVID W. DANIEL, CLERK
U.S. DIST. COURT
E.D. N.C.

United States District Court

EASTERN DISTRICT OF NORTH CAROLINA

ALEXIS LAWRENCE o/b/o KEMMERLYN D. LAWRENCE,
Plaintiff

V.

DONNA E. SHALALA, Secretary of Health and Human Resources,
Defendant

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 93-100-CIV-4-F

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED defendant's motion for judgment on the pleadings is allowed, and plaintiff shall have and recover nothing of the defendant.

THE ABOVE JUDGMENT WAS ENTERED TODAY, MAY 19, 1994, AND COPIES MAILED TO:

Mr. Carl L. Tilghman
P. O. Box 748
Beaufort, NC 28516

Ms. Barbara D. Kocher
Assistant U. S. Attorney
310 New Bern Avenue
Suite 800
Raleigh, NC 27601

I certify the foregoing to be a true copy of the original.
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina
By Margaret M. Bate
Deputy Clerk

May 19, 1994
Date

DAVID W. DANIEL
Clerk

Margaret M. Bate
(By) Deputy Clerk

94-9323

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

_____TERM, 1995

NO._____

_____

_____

ALEXIS LAWRENCE, on behalf of

KEMMERLYN D. LAWRENCE, a minor,

PETITIONER

VS.

DONNA SHALALA

SECRETARY OF HEALTH AND HUMAN SERVICES,

RESPONDENT,

_____

_____

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PROOF OF SERVICE

STATE OF NORTH CAROLINA)
) ss.
COUNTY OF CARTERET)

Carl L. Tilghman, being first duly sworn, deposes and says:

That he is an attorney representing the Petitioner.

That on May 15, 1995, the petition for writ of certiorari in the above entitled case was deposited in the United States Post Office located in Richmond, Virginia, with first class postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States and within the time allowed for filing said petition for writ of certiorari;

That an additional copy of the petition and the affidavit of the proof of mailing of the petition was served

EDITOR'S NOTE

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No. 94-9323

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ALEXIS LAWRENCE, ON BEHALF OF
KEMMERLYN D. LAWRENCE, PETITIONER

v.

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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Washington, D.C. 20530
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QUESTION PRESENTED

Whether the Commissioner of Social Security, in applying state intestacy laws that are incorporated by reference into provisions of the Social Security Act that govern illegitimate children's eligibility for benefits, must take into account claims that those state laws are unconstitutional.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 94-9323

ALEXIS LAWRENCE, ON BEHALF OF
KEMMERLYN D. LAWRENCE, PETITIONER

v.

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY[1]

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not reported. The orders of the district court (App., infra, 1a), the

---

[1] Pursuant to the Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1464, the functions of the Secretary of Health and Human Services in Social Security cases were transferred to the Commissioner of Social Security effective March 31, 1995. In accordance with Rule 35.3 of the Rules of this Court and Section 106(d) of Pub. L. No. 103-296, 108 Stat. 1476-1477, Shirley S. Chater, Commissioner of Social Security, should be substituted for Donna E. Shalala, Secretary of Health and Human Services, as the respondent in this action. For convenience, we will refer to "the Secretary" when discussing actions taken by the Secretary of Health and Human Services prior to the transfer of authority.

Appeals Council of the Department of Health and Human Services (App., infra, 2a-4a), and the administrative law judge (App., infra, 5a-14a) are not reported.[2]

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1995. The petition for a writ of certiorari was filed on May 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1.a. Under the Social Security Act, unmarried minor children of a deceased individual who was insured under the Act may receive survivor's benefits if they were "dependent upon such individual" prior to his death. 42 U.S.C. 402(d)(1)(C). A child who is legitimate or legally adopted by the insured is deemed dependent and thus is entitled to benefits. 42 U.S.C. 402(d)(3). An illegitimate child can establish dependency by several means. First, the child may show that the insured was his parent and was living with the child or contributing to his or her support at the time of the insured's death. 42 U.S.C. 416(h)(3)(C)(ii). Second, the child may show that his or her parents went through a purported marriage ceremony, but that their marriage was invalid because of a legal impediment. 42 U.S.C. 416(h)(2)(B). Third, the child may show that the insured, prior to his death, had (a) acknowledged the

[2] The orders of the district court, the Appeals Council, and the administrative law judge, which are not included in the appendix to the petition, are reproduced as an appendix to this brief.

child as his son or daughter in writing, (b) been decreed by a court to be the child's parent, or (c) been ordered by a court to contribute to the support of the child on the basis of parenthood. 42 U.S.C. 416(h)(3)(C)(i). Section 402(d)(3) provides that any child who meets the tests in Sections 416(h)(2)(B) and 416(h)(3) "shall be deemed to be the legitimate child of such individual."

In addition, an illegitimate child can qualify for benefits without meeting any of the foregoing tests for showing dependency if the child is entitled to inherit personal property under "such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which [the] insured individual * * * was domiciled at the time of his death." 42 U.S.C. 416(h)(2)(A). An illegitimate child who meets the standard of Section 416(h)(2)(A) is deemed to be legitimate and therefore dependent. See Mathews v. Lucas, 427 U.S. 495, 514-515 n.17 (1976); see also Jimenez v. Weinberger, 417 U.S. 628, 631 n.2 (1974).

In Mathews v. Lucas, supra, the Court upheld the constitutionality of 42 U.S.C. 416(h)(2)(A) and other provisions of the Social Security Act dealing with an illegitimate child's right to survivor's benefits. The Court noted that the reason for the various criteria was "to determin[e] * * * dependency", so that the Act would "provid[e] only for those children for whom the loss of the parent is an immediate source of * * * need." 427 U.S. at 507. The Court specifically explained the rationale for Section 416(h)(2)(A):

> [W]here state intestacy law provides that a child may take personal property from a father's estate, it may reasonably be thought that the child will more likely be dependent during the parent's life and at his death. For in its embodiment of the popular view within the jurisdiction of how a parent would have his property devolve among his children in the event of death, without specific directions, such legislation also reflects to some degree the popular conception within the jurisdiction of the felt parental obligation to such an "illegitimate" child in other circumstances, and thus something of the likelihood of actual parental support during, as well as after, life.

427 U.S. at 514-515 (footnote omitted). In short, Congress incorporated state law of intestacy into Section 416(h)(2)(A) because it believed that body of state law, together with the other eligibility criteria discussed above (e.g., a written acknowledgement of paternity or a paternity decree), constituted a "narrow set of objective and apparently reasonable indicators" of a "likelihood of actual support" at the time of the parent's death. 427 U.S. at 516; see also id. at 503, 510.

b. North Carolina law allows a civil action to be brought to establish the paternity of a child born out of wedlock. Proof of paternity in such an action must be "by clear, cogent, and convincing evidence," N.C.G.S. 49-14(a), (b), and such an action may not be commenced, or judgment entered in it, after the death of the putative father. N.C.G.S. 49-14(c). The North Carolina statute governing intestate succession, N.C.G.S. 29-19(b), in turn provides that "an illegitimate child shall be entitled to take by, through or from: (1) Any person who has been finally adjudged to be the father of such child pursuant to," inter alia, N.C.G.S. 49-14.

2. Petitioner was born on March 18, 1989. App., infra, 13a. On March 28, 1990, the State of North Carolina filed a civil action in state court on petitioner's behalf against Frank A. Lewis, Jr., alleging that Lewis was petitioner's father. Id. at 5a, 8a, 13a; Pet. App. 2. Blood tests taken for that proceeding established Lewis's paternity with a 99.98% probability, and DNA tests raised that to a 99.99% probability. Pet. App. 2. Lewis died in an industrial accident on August 10, 1990, before the North Carolina court could enter a judgment of paternity. Ibid.; App., infra, 9a, 13a. Accordingly, the State voluntarily dismissed the action that it had brought on petitioner's behalf. Pet. App. 2.; App., infra, 9a.

Petitioner (through her grandmother, Alexis Lawrence) then filed an application for child's insurance benefits under the Social Security Act. Pet. App. 2. The administrative law judge (ALJ) considered the blood and DNA tests and testimony of several persons who knew Lewis. Petitioner's mother testified that she knew Lewis was petitioner's father, that the paternity action had been filed to obtain support for petitioner, and that the lawsuit was dismissed only because Lewis had died. Lewis's mother and aunt testified that Lewis had admitted paternity to them but had said that he could not acknowledge paternity publicly because he was married to another woman. App., infra, 9a-11a. The ALJ concluded that "[t]he evidence clearly demonstrates in this case that but for the provision of section 49-14, preventing the entry of any judgment in a paternity case after the death of the putative father,

Mr. Lewis would have been declared the father of [petitioner] and an order of paternity would have been entered." App., infra., 9a.

The ALJ also concluded that the purpose of the North Carolina statute, which is to prevent "specious and deceitful claims," would not be served by strictly applying the statute in a case where, as here, the paternity action was filed well before the putative father's death and he submitted to blood testing in that action showing "an almost 100 percent probability" of paternity. App., infra, 11a-12a. The ALJ decided to "liberally construe the [Social Security] Act" to allow benefits, notwithstanding the "insurmountable barrier raised by North Carolina's intestate succession law that no paternity judgment could be entered after the putative father's death." Id. at 12a.

Lewis's widow and their legitimate son, who were parties to the administrative hearing, asked for and obtained review by the Appeals Council. App., infra., 2a, 5a. The Appeals Council reversed the ALJ's order, explaining (id. at 3a-4a) that petitioner's inability to secure a judgment of paternity under North Carolina law rendered her unable to qualify for benefits under 42 U.S.C. 416(h)(2)(A).

3. Petitioner sought review of the Secretary's decision by filing a civil action in the United States District Court for the Eastern District of North Carolina, alleging that the application of North Carolina law to deny her benefits under the Social Security Act violated her equal protection rights. The district court summarily affirmed. App., infra, 1a. The court explained that it

was "without authority to revisit the seemingly harsh rule" of the Fourth Circuit, which applies a state intestacy statute under Section 416(h)(2)(A) without inquiry into its constitutionality. Ibid., citing Parsons for Bryant v. Health & Human Services, 762 F.2d 1188, 1190 (4th Cir. 1985).

4. The court of appeals affirmed. Pet. App. 1-5. The court adverted to petitioner's reliance on Handley v. Schweiker, 697 F.2d 999 (11th Cir. 1983), a case in which the Eleventh Circuit required the Secretary to award benefits, notwithstanding Alabama's rule that a judgment of paternity may be entered only during the putative father's lifetime, on the ground that the Alabama statute was unconstitutional. Pet. App. 3-4. The court explained, however, that in Jones v. Schweiker, 668 F.2d 755 (4th Cir. 1981), vacated sub nom. Jones v. Heckler, 460 U.S. 1077 (1983), it had held, "reject[ing] the Eleventh Circuit's analysis," that the state statute would apply to deny federal benefits regardless of whether that statute would be constitutional when applied directly in the intestate succession context. The court noted that Jones was reaffirmed in Parsons, supra, and it endorsed Jones's rationale: that the Social Security Act treats illegitimate children differently based on the concept of dependency, and that it uses the state intestacy statute only indirectly to determine the state legislature's judgment of where a dependency relationship was probable. Pet. App. 4-5, citing Mathews v. Lucas, supra.

ARGUMENT

Petitioner correctly notes that the decision below conflicts with the decisions of other circuits on the threshold question of whether the constitutionality of a state's intestate succession statute should be considered in deciding whether an illegitimate child may obtain benefits under 42 U.S.C. 416(h)(2)(A). The Social Security Administration has re-examined that question and is now persuaded that Section 416(h)(2)(A) requires a determination, at least in some circumstances, of whether the state intestacy statute is constitutional. Because the courts below did not reach that question, we suggest that this Court grant certiorari, vacate the judgment below, and remand the case for further proceedings in light of the position taken in this brief.

1. Section 416(h)(2)(A) directs the Commissioner (as successor to the Secretary) to "apply such law as would be applied * * * by the courts of the State in which [the insured] was domiciled at the time of his death." The court of appeals was assuredly correct that Congress intended to use state intestacy statutes as a proxy for "dependency," since children who stand to inherit under those statutes "may reasonably be thought * * * more likely [to] be dependent during the parent's life and at his death." Mathews v. Lucas, 427 U.S. 495, 514-515 (1976). That purpose, however, cannot without more override or limit the plain import of the text of the Social Security Act, which is to require application of the "law" that would be applied by the courts of the relevant State. As the dissenting judge pointed out in Jones, "the courts of [each State]

are bound by the Supremacy Clause," and therefore "a State court, construing its intestate succession statute, must consider whether its law violate[s] the Equal Protection Clause." 668 F.2d at 764 (Bryan, J., dissenting); see also Cox v. Schweiker, 684 F.2d 310, 317-318 (5th Cir. 1982). Thus, if a state court would broaden the rights of illegitimate children to inherit, in order to bring the state statute into compliance with the federal Constitution, a federal court applying Section 416(h)(2)(A) should apply the state law as it would be reformed by the state courts, without necessarily being bound by the language of the statute as originally passed by the state legislature. See Cox, 684 F.2d at 317.

Accordingly, if the Court vacates the judgment below, we intend to inform the court of appeals on remand that the Commissioner no longer adheres to the position that the Social Security Act adopts only the text of the state intestacy statute as written. In our view, the Fourth Circuit has not yet given full consideration to the proper interpretation of the Social Security Act after its ruling in Jones, which was vacated and remanded by this Court for further consideration in light of intervening changes in the state laws that were at issue in that case. See 460 U.S. 1077 (1983). When the Fourth Circuit subsequently refused to consider the constitutionality of the state statute at issue in Parsons, it did so without revisiting the merits of the Jones rule, apparently on the basis of the erroneous belief that it was required to follow

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[3] Proceedings on remand in Jones v. Heckler are reported at 712 F.2d 924 (4th Cir. 1983), and 754 F.2d 519 (4th Cir. 1985). See Parsons, 762 F.2d at 1190 n.*.

Jones, notwithstanding that this Court's vacatur of the judgment in Jones deprived that case of precedential force. See Parsons, 762 F.2d at 1190. The Fourth Circuit panel in this case therefore was mistaken in believing that petitioner's position was foreclosed because that court had "already engaged in an extensive review of the basis for [its] prior holdings." Pet. App. 5. The disposition we propose will enable the Fourth Circuit to conduct that review. In the alternative, the Fourth Circuit might in turn choose to remand the case to the Commissioner for consideration of petitioner's claim in the first instance under the interpretation of Section 416(h)(2)(A) set forth herein.

2. While a remand is appropriate because the courts below did not consider either the Commissioner's current interpretation of Section 416(h)(2)(A) or petitioner's constitutional challenge to the North Carolina intestacy statute, we do not believe that the Commissioner (and the federal courts that review her decisions) must conduct, in every case, an extended inquiry into the constitutionality of state intestacy statutes when those statutes are challenged by Social Security claimants. In some cases, the State's highest court will have considered and rejected the same federal constitutional challenge to the state intestacy statute that the claimant seeks to raise in the Social Security proceeding.[4] Absent a substantial claim that intervening decisions of this Court demonstrate that the State's highest court committed error, the Commis-

[4] Conversely, in other cases, the state statute will already have been held unconstitutional in state court. See, e.g., Fulton v. Harris, 658 F.2d 641, 643 (8th Cir. 1981).

sioner may properly place great weight on such a decision from the court that is most familiar with the policies furthered by the particular state intestacy statute at issue. Indeed, the Supreme Court of North Carolina has upheld the statute challenged by petitioner on the authority of Lalli v. Lalli, 439 U.S. 259 (1978), in which this Court upheld a New York statute that similarly required paternity to be established during the life of the putative father. See Mitchell v. Freuler, 254 S.E.2d 762 (N.C. 1979).

In the circumstances presented by this case, we anticipate that the Fourth Circuit or the Commissioner on remand would be required to conduct some independent examination of the merits of petitioner's constitutional challenge to the North Carolina statute, because, in declaring essentially similar statutes unconstitutional, the Eleventh Circuit relied on this Court's post-Lalli decisions in Mills v. Habluetzel, 456 U.S. 91 (1982), Pickett v. Brown, 462 U.S. 1 (1983), and Clark v. Jeter, 486 U.S. 456 (1988). See Handley, 697 F.2d at 1002-1006; see also Daniels v. Sullivan, 979 F.2d 1516 (11th Cir. 1992).[5] In those cases, this Court struck

[5] In the event of a remand, we will alert the court of appeals to the provisions of 28 U.S.C. 2403(b), which require federal courts, when the constitutionality of "any State statute * * * affecting the public interest is drawn into question," to notify that State's attorney general and to permit the State "to intervene * * * on the question of constitutionality." See, e.g., Maine v. Taylor, 477 U.S. 131, 133 (1986) (State intervenes in federal criminal prosecution to defend constitutionality of state statute). Because the disposition we propose does not require this Court to pass on the constitutionality of the North Carolina statute, we do not believe that Section 2403(b) requires this Court to notify the State of North Carolina of petitioner's challenge to its intestacy statute. Lewis's widow and their legitimate son, who were parties to the administrative proceedings, should also be afforded an

(continued...)

down state statutes that required that paternity proceedings on behalf of illegitimate children be brought within a limited time after the child's birth (one year, two years, and six years, respectively).

In our view, the Eleventh Circuit was wrong to conclude that if a particular alleged father happens to die when the child is still very young, it necessarily follows that a state rule requiring that a judgment of paternity be entered before the father's death is unconstitutional as applied to that child. The Eleventh Circuit's reasoning confuses a situation where the child is barred because of a short general statute of limitations based on the age of the child with a situation where the general rule allows the child to bring suit within a longer limitations period, so long as the putative father does not die before judgment, but where on occasion the father will die young, thus barring a particular claim. Under the applicable standard of intermediate scrutiny, see Clark, 486 U.S. at 461, the proper inquiry would appear to be whether the statutory scheme as a whole is unduly restrictive, not whether occasionally it will bring about harsh results. Indeed, Lalli upheld a similar statute on the ground that, as a general matter, it substantially served important s ate interests, even though those interests were not served in some cases, since "few statutory classifications are entirely free from the criticism that they some-

[5](...continued)
opportunity to participate, in light of the government's new position.

times produce inequitable results." 439 U.S. at 272-273 (plurality opinion).[6]

We have not, however, reached a firm conclusion as to the constitutionality, in the intestacy context, of the North Carolina paternity-suit statute, especially in the category of cases, such as this one, in which the paternity suit was commenced and compelling scientific evidence of paternity was adduced prior to the death of the putative father. Cf. Clark, 486 U.S. at 465. Because the Fourth Circuit has not yet considered either the merits of the constitutional question or the Commissioner's new position that Section 416(h)(2)(A) calls for consideration of that question -- and because the State of North Carolina has not yet had the opportunity to defend the constitutionality of its intestate succession statute in this setting (see note 5, supra) -- we believe that it would be premature for this Court to consider those issues. They should instead be considered by the Fourth Circuit or the Commissioner in the first instance. After a final decision by the Fourth Circuit on remand, the losing party may determine whether to seek this Court's review of the statutory or constitutional question.

[6] The two members of the majority who did not join the plurality -- then-Justice Rehnquist and Justice Blackmun -- would have upheld the New York statute under an even more deferential standard. 439 U.S. at 276-277.

CONCLUSION

This Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of the position taken in this brief.

Respectfully submitted.

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Attorneys

AUGUST 1995

FILED

MAY 19 '94

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
NEW BERN DIVISION**

No. 93-100-CIV-4-F

ALEXIS LAWRENCE o/b/o KEMMERLYN D. LAWRENCE, Plaintiff,

v.

DONNA E. SHALALA, Secretary of Health and Human Resources, Defendant.

O R D E R

For the reasons set forth in the defendant's Memorandum in Support of the Secretary's Decision, the defendant's Motion for Judgment on the Pleadings is ALLOWED, the plaintiff's Motion for Judgment on the Pleadings is DENIED, and the Secretary's decision is AFFIRMED because substantial evidence supports that decision. As plaintiff acknowledges, the law in this circuit is against her. This court is without authority to revisit the seemingly harsh rule of decision of the Fourth Circuit Court of Appeals in Parsons for Bryant v. Health and Human Services, 762 F.2d 1188, 1190 (4th Cir. 1985) (even if a state intestacy statute is unconstitutional, illegitimate child in particular circumstance not entitled to child's insurance benefits under provisions of 42 U.S.C. § 416(h)(2)(A)).

SO ORDERED. This 17th day of May, 1994.

**JAMES C. FOX
United States District Judge**

I certify the foregoing to be a true and correct copy of the original
David W. Daniel, Clerk
United States District Court
Eastern District of North Carolina
By
Deputy Clerk

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

DECISION OF APPEALS COUNCIL

In the case of	Claim for
Alexis Lawrence on behalf of Kemmerlyn Lawrence (Name)	Surviving Child's Insurance Benefits
Frank A. Lewis, Jr. (Wage Earner) (Leave blank if same as above)	216-59-6557 (Social Security Number)

Claudia Lewis and Frank A. Lewis, III
Parties-at-Interest

This case is before the Appeals Council on a request for review of the April 14, 1992 hearing decision filed by the parties-at-interest. The Appeals Council granted the request for review, pursuant to 20 CFR 404.970, due to an error of law and notified the claimant, the parties-at-interest, and their respective representatives of their rights with respect thereto.

The Administrative Law Judge's statements as to the pertinent provisions of the Social Security Act and the evidentiary facts before him are incorporated herein by reference and supplemented below.

Material in addition to that which was before the Administrative Law Judge has been entered into the record by the Appeals Council as follows:

Exhibit AC-1 Request for review by parties-at-interest, and attachments

Exhibit AC-2 Letter, dated December 2, 1992, from representative for parties-at-interest

Exhibit AC-3 Copy of Appeals Council's grant review notice to parties-at-interest and their representative

Exhibit AC-4 Copy of Appeals Council's grant review notice to claimant and representative

Exhibit AC-5 Response from representative for claimant

Exhibit AC-6 Response from representative for parties-at-interest

ISSUE

The issue before the Appeals Council is whether Kemmerlyn Lawrence is entitled to surviving child's insurance benefits on the wage earner's earnings record. This depends on whether she is the child of the wage earner under the laws of the State of North Carolina and, therefore, section 216(h)(2)(A) of the Social Security Act. There has been no contention and the record contains no evidence that Kemmerlyn Lawrence qualifies as a child of the wage earner under any other section of the Social Security Act.

EVIDENCE CONSIDERED

The Appeals Council has carefully considered the arguments made and the exhibits of record.

EVALUATION OF THE EVIDENCE

In his decision, the Administrative Law Judge found that, except for the wage earner's death and North Carolina's paternity and intestate succession laws, the North Carolina courts would have entered an order of paternity against the wage earner finding that he was the father of Kemmerlyn Lawrence; that she is, therefore, the child of the wage earner under section 216(h)(2)(A) of the Social Security Act; and that she is entitled to surviving child's insurance benefits on the wage earner's earnings record, pursuant to her application of September 24, 1990. The Appeals Council does not agree with the Administrative Law Judge's findings.

Section 216(h)(2)(A) of the Social Security Act provides that in determining whether an applicant is the child of an insured individual the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which the insured individual was domiciled at the time of his death. Applicants who according to such law would have the same status relative to taking intestate personal property as a child shall be deemed such.

The inheritance rights of illegitimates in North Carolina, where the wage earner died domiciled on August 10, 1990, are governed by North Carolina General Statutes 29-19. According to N.C. Gen. Stat. 29-19(b), an illegitimate child can take an intestate child's share of his natural father's estate if: 1) an individual has been finally adjudged to be the father of such child pursuant to the provisions of G.S. 49-1 through 49-9 or the provisions of G.S. 49-14 through 49-16; or 2) an individual has acknowledged himself during his own life- time and the child's lifetime to be the father of such child in a written instrument executed or acknowledged before a certifying officer named in G.S. 52-10(b) and filed during his own lifetime and the child's lifetime in the office of the clerk of superior court of the county where either he or the child resides.

N.C. Gen. Stat. 49-14 provides the criteria for establishing the paternity of a child born out of wedlock:

a) The paternity of the child may be established by civil action at any time prior to such child's eighteenth birthday;

b) Proof of paternity shall be beyond a reasonable doubt;

c) No such action shall be commenced nor judgment entered after the death of the putative father;

d) If the action to establish paternity is brought more than three years after the child's birth, paternicy shall not be established in a contested case without evidence from a blood grouping test or evidence that the putative father has declined an opportunity for such testing.

Because the wage earner died prior to the entry of a judgment in the paternity action which commenced March 28, 1990, he was not finally adjudged to be the father of Kemmerlyn Lawrence, as required by N.C. Gen. Stat. 29-19(b)(1) and she is, therefore, not entitled to take an intestate child's share of the wage earner's estate. In addition, Kemmerlyn Lawrence does not qualify to take an intestate child's share of of the wage earner's estate under 29-19(b)(2) because the wage earner did not execute, during his lifetime and before a certifying officer of the superior court, a written instrument acknowledging that he was her father. As she does not have the status of a child for purposes of taking the wage earner's intestate personal property, Kemmerlyn Lawrence is not the child of the wage earner under section 216(h)(2)(A) of the Social Security Act. The evidence does not establish that she would qualify as a child of the wage earner under section 216(h)(2)(B) or section 216(h)(3)(C) of the Social Security Act.

DECISION

It is the decision of the Appeals Council that Kemmerlyn Lawrence is not the child of the wage earner, as that term is defined in the Social Security Act, and is not entitled to surviving child's insurance benefits on the wage earner's earnings record. The decision of the Administrative Law Judge is hereby reversed.

APPEALS COUNCIL

Debra Morriss
Administrative Appeals Judge

Catherine Ravinski
Administrative Appeals Judge

DATE: May 7, 1993

NOTE TO PROCESSING CENTER
FURTHER ACTION NECESSARY

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF	CLAIM FOR
Alexis Lawrence for Kemmerlyn D. Lawrence	Survivor's insurance Benefits (Child's)
(Claimant)	
Frank A. Lewis, Jr. (Wage Earner)	246-59-6557 (Social Security Number)

PROCEDURAL HISTORY

On September 24, 1990, Alexis Lawrence filed for child's insurance benefits on behalf of her granddaughter, Kemmerlyn Lawrence, based on the earnings record of the deceased wage earner, Frank A. Lewis, Jr. (Exhibit 1). She noted on this application that the deceased wage earner had another child, Frank A. Lewis, III, and she assumed that an application had been filed previously on his behalf (Exhibit 1). The application was denied initially and upon reconsideration on the grounds that Kemmerlyn did not qualify as a child of the deceased wage earner within the meaning of sections 216(h)(2) and (3) of the Social Security Act (Exhibits 2 and 3). The claimant then made a timely request for a hearing before an Administrative Law Judge. Before the hearing was held, the Administrative Law Judge issued an order on October 29, 1991, joining Claudia Lewis, the wage earner' widow, and her son by the wage earner, Frank A. Lewis, III, as necessary parties to the proceeding.

Pursuant to the claimant's request, a hearing was held in New Bern, North Carolina, on February 26, 1991. The claimant and her mother were ably represented by Carl Tilghman, an attorney-at-law. Claudia and Frank Lewis, III were also ably represented by Robert A. Joneth, an attorney-at-law. Appearing as witnesses on behalf of the claimant were Billie Harvey, Kemmerlyn's mother, Dr. Kristine Durkee, Associate Director of Genetic Design, Inc., Emma Lewis, Frank Lewis, Jr.'s mother, Tangelina Garner, Frank Lewis Jr.'s aunt, and Claudia Arnold, Billie Harvey's sister. Claudia Lewis appeared at the hearing and testified on her and

her son's behalf. Appearing as witnesses on their behalf were Andrea Lewis, Frank Lewis Jr.'s sister, and Frank Andrew Lewis, Frank Lewis Jr.'s father. At the hearing, Mr. Joneth objected to the admission into the record of documents marked as exhibits 11, 14, and 21. These exhibits were letters that were not relevant to the issue in question. The Administrative Law Judge sustained the objection and such documents were deleted from the record and were not relied upon by the Administrative Law Judge in reaching his decision in this case.

ISSUES

The general issue in this case is whether Kemmerlyn Lawrence is entitled to survivor's (child's) insurance benefits based on the earnings record of the deceased wage earner, Frank A. Lewis, Jr., pursuant to sections 202(d)(1) and 216(h)(2) and (3) of the Social Security Act, as amended [42 U.S.C. 402(d)(1) and 416(2) and (3)]. The specific issues are whether Kemmerlyn Lawrence is the child of Frank A. Lewis, Jr. within the meaning of section 216(h)(2)(A) of the Act [42 U.S.C. 416(2)], and was dependent on him at the time of his death.

DISCUSSION

Section 202(d)(1) of the Social Security Act, as amended [42 U.S.C. 402(d)(1)], provides that every child of an individual who dies a fully or currently insured individual is entitled to benefits if the child has filed an application for child's insurance benefits, was unmarried at the time the application was filed and either had not attained the age of 18 or was a full-time school student and had not attained the age of 19 or was under a disability before reaching the age of 22, and was dependent upon the deceased insured individual at the time of the individual's death.

In this case, Alexis Lawrence applied for child's insurance benefits on behalf of Kemmerlyn Lawrence when Kemmerlyn was 18 months old. The first two requirements for Kemmerlyn to receive survivor's (child's) insurance benefits under section 202(d)(1) and therefore satisfied. The questions remaining to be determined are whether Kemmerlyn was the child of the deceased wage earner, Frank Lewis, Jr., and whether she was dependent upon him at the time of his death.

In determining whether an applicant is the child of a deceased insured individual for purposes of Title II of the Social Security Act, the Secretary shall, among other things, apply such law as would be applied in determining the devolution of intestate personal property by the courts of the state in which

the insured was domiciled at the time of his death. Section 216(h)(2)(A) of the Social Security Act, as amended [42 U.S.C. 416(2)(A)]. Applicants who according to such law would have the same status relative to taking intestate personal property as a child shall be deemed such. Id.

If an applicant is a son or daughter of a fully or currently insured individual but is not deemed to be the child of the deceased individual under section 216(h)(2)(A), such applicant shall nevertheless be deemed to be the child of the individual if the insured individual and the mother or father of the applicant went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment, would have been a valid marriage. Section 216(h)(2)(B) of the Social Security Act, as amended [42 U.S.C. 416(2)(B)].

An applicant who is the son or daughter of a fully or currently insured deceased individual who is not the child of such insured individual under paragraph (2) shall nevertheless be deemed to be the child of such insured individual if such insured individual acknowledged in writing that the applicant was his or her son or daughter, or if such insured had been decreed by a court to be the mother or father of the applicant, or had been ordered by a court to contribute to the support of the applicant because the applicant was his or her son or daughter, and such acknowledgment, court decree, or court order was made before the death of such insured individual, or if such insured individual is shown by evidence satisfactory to the Secretary to have been the mother or father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such insured individual died. Section 216(h)(3)(C) of the Social Security Act, as amended [42 U.S.C. 416(3)(C)].

For purposes of section 202(d)(1) of the Act, a child of a deceased wage earner shall be deemed dependent upon his/her father or mother at the time of death unless, at the time of death, such individual was not living with or contributing to the support of the child and the child is neither the legitimate nor adopted child of such individual or such child has been adopted by some other individual. Section 202(d)(3) of the Social Security Act, as amended [42 U.S.C. 402(3)]. For purposes of this paragraph, a child deemed to be the child of a fully or currently insured individual pursuant to sections 216(h)(2)(B) or (3) shall be deemed to be the legitimate child of such individual and therefore dependent on the deceased wage earner. Id.

The evidence establishes that Kemmerlyn does not meet the criteria in sections 216(h)(2)(B) and (3)(C) of the Social Security Act for determining the status of a child and dependency prior to the death of a deceased wage earner. Billie Harvey,

Kemmerlyn's mother, did not go through a marriage ceremony with the deceased wage earner, as required by section 216(h)(2)(B). Nor was there an acknowledgment, court decree or court order of paternity made before the wage earner's death or evidence that Frank Lewis, Jr. was living with or contributing to Kemmerlyn's support at the time he died, as required by section 216(h)(3)(C).

Case law, however, has held that Congress provided a child the means of establishing dependency in another way, even after a parent's death. It has been held that the adoption of the intestate succession provision at section 216(h)(2)(A) of the Act extended the ways to establish dependency by allowing a child to establish his/her qualification as an intestate taker. Jones v. Schweiker, 668 F2d 755, 760 (4th Cir. 1982).

The issue, therefore, is whether Kemmerlyn satisfies the requirement of section 216(h)(2)(A) of the Act and can show that according to the law of North Carolina, the state in which the insured wage earner was domiciled at the time of his death, she would have the same status relative to taking intestate personal property as the deceased's child. By meeting such requirement, Kemmerlyn would meet the "child" and "dependency" requirements of section 202(d)(1) of the Act and would be entitled to survivor's (child's) insurance benefits.

Under the North Carolina law applicable to this case, an illegitimate child shall be entitled for purposes of intestate succession to take by, through and from any person who has been finally adjudged to be the father of such child pursuant to the provisions of N.C.G.S. 49-1 through 49-9 or the provisions of N.C.G.S. 49-14 through 49-16. N.C.G.S. 29-19(b). N.C.G.S. 49-14, which is the provision of North Carolina Law applicable to this case, provides that the paternity of a child born out of wedlock may be established by a civil action at any time prior to the child's eighteenth birthday. If such action is brought more than three years after the birth of the child, paternity shall not be established in a contested case without evidence from a blood grouping test. Id. Proof of paternity pursuant to this section shall be beyond a reasonable doubt, and no action shall be commenced or judgment entered after the death of the putative father. Id.

The evidence in this case shows that a civil action to establish that Frank A. Lewis, Jr. was the father of Kemmerlyn Lawrence was filed on March 28, 1990 by the State of North Carolina by and through its New Bern Child Support Enforcement Office on the relation of Alexis Lawrence on behalf of Billie Harvey (Exhibit 19). [In May 1989, Ms. Harvey had executed a power of attorney and guardianship agreement in order for Ms. Lawrence to care for Kemmerlyn while Ms. Harvey was away from home in the job corps (Exhibit 10).] The State requested in its complaint that the

court issue an order adjudicating that Frank Lewis, Jr. was the natural, biological father of Kemmerlyn Lawrence, and requiring that Mr. Lewis provide support and maintenance for Kemmerlyn (Exhibit 19, pages 35 and 36). Pursuant to a motion made by Mr. Lewis in the case, the court issued an order compelling blood testing of Billie Harvey, Kemmerlyn Lawrence, and Frank Lewis, Jr. (Exhibit 19, pages 24 through 25). The results of the blood test showed that Mr. Lewis could not be excluded as the biological father with a probability of paternity of 99.98 percent. Additional DNA testing performed at the request of Mr. Lewis showed a probability of paternity of 99.99 percent (Exhibit 13). This civil action was continued for a number of months while the parties were waiting on the blood test and DNA results (Exhibit 19, pages 22 through 43). The action was voluntarily dismissed by the plaintiff only because Mr. Lewis was killed in a work-related accident on August 10, 1990 (Exhibit 19, pages 2 through 5).

The evidence clearly demonstrates in this case that but for the provision of section 49-14, preventing entry of any judgment in a paternity case after the death of the putative father, Mr. Lewis would have been declared the father of Kemmerlyn and an order of paternity would have been entered. Section 49-14 requires that proof of paternity be established beyond a reasonable doubt. The evidence of record and the testimony provided by the witnesses at the hearing, who could also have testified as witnesses in the civil action, establish beyond a reasonable doubt that the wage earner, Frank A. Lewis, Jr., was the father of Kemmerlyn Lawrence.

The birth certificate of Kemmerlyn Dawn Lawrence reveals that she was born on March 18, 1989 to Billie Dawn Harvey in Carteret County, North Carolina. The name of the father was not stated on the birth certificate (Exhibit 6). Ms. Harvey testified that the reason she had not put Mr. Lewis' name on Kemmerlyn's birth certificate was because she was not married to him and did not have an affidavit from him acknowledging paternity. Ms. Harvey testified that she knew Mr. Lewis was Kemmerlyn's father because she had had sexual relations with him twice between June 15 and July 4, 1988, the period during which Kemmerlyn would have been conceived. She stated that she was not having sexual relations with anyone else at that time. She said that when she had applied for aid with the Department of Social Services while she was pregnant, she had not reported Mr. Lewis as the father only because she had wanted no trouble from him. She said that the lawsuit had been instituted to prove paternity and get child support from Mr. Lewis. The blood test and DNA testing were ordered as a result of this lawsuit and showed that there was a 99.98 and 99.99 percent probability that Mr. Lewis was the father. She testified that the only reason the lawsuit had been dismissed was because Mr. Lewis had died.

Dr. Kristine Durkee, Associate Director of Genetic Design, Inc., the company that performed the blood and DNA testing in the case, testified in the capacity of an expert as to the procedure for the testing and the reliability and accuracy of such testing. Dr. Durkee stated that the blood for the tests was drawn on May 14, 1990 and received by a technician with her company on May 15, 1990. She referred to Exhibit 13 in the record, the paternity evaluation reports of the test results, and pointed out that such results demonstrated that Mr. Lewis could not be excluded as the father of Kemmerlyn. She stated that the paternity index based on the blood testing showed a probability of Mr. Lewis' paternity of 99.98 percent. When the DNA results were figured into this index, it raised the probability to 99.99 percent that Mr. Lewis was the father of Kemmerlyn. Dr. Durkee expressed the opinion that the genetic evidence proved that Mr. Lewis was the father of Kemmerlyn Lawrence.

The Administrative Law Judge finds that such test results and Ms. Durkee's testimony are entitled to great weight in this case. Under North Carolina law, blood tests may be used as evidence in a paternity action. N.C.G.S. 49-14(d) even requires evidence from a blood grouping test if a paternity action is brought more than three years after the child's birth. Although blood tests are primarily reliable for excluding the possibility of paternity and not for proving paternity, the North Carolina legislature has not mandated the weight to be given to blood tests which do not exclude the putative father. Smith v. Price, 315 N.C. 523, 530, 340 S.E.2d 408, 412 (1986). The jury is entitled to consider this evidence and accord it the weight deemed appropriate. Id. In view of the evidence of the accuracy and reliability of the tests, the Administrative Law Judge in this case accords such evidence great weight in the determination of paternity.

Although Mr. Joneth introduced into evidence an article from Science magazine discrediting such genetic testing (Exhibit 27), Dr. Durkee testified why she did not agree with the article and stated that she had, in fact, written a response to the editor of the magazine. The Administrative Law Judge finds that this article alone is not sufficient to discredit or weaken the testimony of Dr. Durkee, an expert in her field, or cast doubt on the accuracy and reliability of the testing.

Furthermore, the testimony of Emma Lewis, Tangelina Garner, and Claudia Arnold provide further evidence that Mr. Lewis is the father of Kemmerlyn. Emma Lewis testified that although her son had been raised by his grandparents, she had seen him at a family get-together at Harker's Island in June 1990. At that time, she testified, Mr. Lewis told her he thought that Kemmerlyn was his child but that he could not acknowledge her due to his being married. Ms. Lewis said that her son indicated he would try to

get custody of Kemmerlyn if it were proven that he was the father. She said that she had later had a phone conversation with her son to the same effect. Such testimony is consistent with Ms. Lewis' signed sworn statement dated May 20, 1991 and entered into the record as Exhibit 17.

Ms. Garner, Mr. Lewis' aunt and Emma Lewis' sister, testified that Frankie had told her basically what he had told his mother. She said that Mr. Lewis had not done anything to acknowledge Kemmerlyn as his daughter because of his wife and her mother. Claudia Arnold, Billie Harvey's sister, testified that she had seen Ms. Harvey and Mr. Lewis together in June 1988 and followed them down the beach on one occasion. The Administrative Law Judge additionally notes that pictures introduced into evidence at the hearing of Kemmerlyn and Frank Lewis, Jr. show a striking resemblance between the child and the putative father (Exhibits 28 and 30).

Such evidence establishes beyond a reasonable doubt that Frank A. Lewis, Jr. is the father of Kemmerlyn. The testimony of Claudia Lewis and the witnesses who appeared on her behalf fail to cast any reasonable doubt on this conclusion. Although Ms. Lewis testified that she and Mr. Lewis were dating steadily as of April 1988, she admitted that they were not living together at the time that Kemmerlyn would have been conceived. The testimony of both Andrea Lewis and Frank Andrew Lewis that Mr. Lewis never mentioned Billie Harvey to them is not persuasive in showing that Mr. Lewis never had sexual relations with Billie Harvey. The Administrative Law Judge does not find it unusual that a young man would not discuss every relationship or intimate detail of his life with his father and his sister.

Thus, The Administrative Law Judge, in considering the evidence of the blood test results in combination with the other evidence of record and the testimony offered by the witnesses at the hearing, finds that Frank Lewis, Jr. has been proven to be the father of Kemmerlyn Lawrence beyond a reasonable doubt. The only reason an order was not entered establishing such paternity was because of the provision under North Carolina law that no judgment of paternity be entered after the death of the putative father. N.C.G.S. 49-14(c).

The purpose of North Carolina's law is to minimize the number of specious and deceitful claims and to have the putative father available to aid in fact finding. See Mitchell v. Frauler, 297 N.C. 206, 254 S.E.2d. 762 (1979). By requiring that paternity be established before the putative father's death, the statute guarantees that he would have the opportunity to offer evidence and defend against and defeat such specious claims.

The facts in this case, however, show that the purpose of North Carolina's statute would not be served by strictly applying it to find that Kemmerlyn could not take under North Carolina intestacy laws as the child of Mr. Lewis. In this case, Kemmerlyn's paternity action was filed well before the death of Mr. Lewis. In May 1990, he submitted to blood testing, which showed an almost 100 percent probability that he was the father of Kemmerlyn. The only reason the case was not heard in a more timely manner after the lawsuit was filed was that it was continued to allow for blood and DNA testing, all at the request of Mr. Lewis. As explained above, all of the evidence proves beyond a reasonable doubt that the court would have found that Mr. Lewis was the father of Kemmerlyn and would have entered an order to that effect if Mr. Lewis had lived. This case does not present a situation where the claimant initiated suit after the wage earner's death, thereby depriving him of the opportunity to contest the action. The most persuasive evidence that supported a conclusion of paternity was gathered in the case before the wage earner's death, and at the wage earner's request.

Under such circumstances as presented in this case, the Administrative Law Judge finds that the North Carolina court would have entered an order of paternity finding that Frank Lewis, Jr. was the father of Kemmerlyn Lawrence. Such an order of paternity would have allowed Kemmerlyn to share in Mr. Lewis' estate under the North Carolina intestacy laws. Under such circumstances, Kemmerlyn would qualify as a dependent child of the wage earner, Frank Lewis, Jr., and would be entitled to survivor's (child's) insurance benefits based on the earnings record.

This case presents unique and sympathetic facts which apparently were not contemplated by Congress or the drafters of North Carolina's intestate succession and paternity laws. "The whole thrust of the Act is to confer the benefits of legitimacy on any child found to be dependent." Jones v. Schweiker, 668 F.2d. at 760. The evidence proves beyond a reasonable doubt that Kemmerly would have been found to be dependent on Mr. Lewis in this case but for the insurmountable barrier raised by North Carolina's intestate succession law that no paternity judgment could be entered after the putative father's death. The liberal purpose and remedial nature of the Social Security Act require the Administrative Law Judge to liberally construe the Act and to find that it would allow payment of survivor's (child's) insurance benefits to Kemmerlyn Lawrence in this case.

Accordingly, the Administrative Law Judge finds that Frank Lewis, Jr. was the father of Kemmerlyn Lawrence and that she was dependent upon him at the time of his death. Kemmerlyn Lawrence is therefore entitled to survivor's (child's) insurance benefits based on the earnings record of Frank A. Lewis, Jr.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant, Kemmerlyn Lawrence, was born to Billie Harvey in Carteret County, North Carolina, on March 18, 1989.

2. The wage earner, Frank A. Lewis, Jr., died an insured individual on August 10, 1990.

3. On September 24, 1990, Alexis Lawrence filed an application for child's insurance benefits on behalf of Kemmerlyn Lawrence based on the earnings record of Frank A. Lewis, Jr.

4. Well before the wage earner's death, a paternity suit was instituted on March 28, 1990 on behalf of Kemmerlyn Lawrence against the wage earner.

5. Pursuant to a court order entered in the paternity action, blood and DNA tests were performed on the wage earner, Billie Harvey, and the claimant. The blood test showed a 99.98 percent probability that Mr. Lewis was Kemmerlyn's father. DNA testing raised the probability of paternity to 99.99 percent.

6. The results of the blood and DNA tests were valid and did not exclude the deceased wage earner as the father of the claimant.

7. The testimony of Billie Harvey, Dr. Kristine Durkee, Emma Lewis, Tangelina Garner, and Claudia Arnold are found to be credible and persuasive in establishing paternity of the claimant in this case

8. The testimony of the witnesses, the blood and DNA test results, and the other evidence of record, establish beyond a reasonable doubt that the wage earner was the father of Kemmerlyn Lawrence.

9. But for the wage earner's death and North Carolina's paternity and intestate succession laws, the North Carolina courts would have entered an order in the paternity action instituted against the wage earner finding that the wage earner, Frank A. Lewis, Jr., was the father of the claimant, Kemmerlyn Lawrence.

10. As the child of the wage earner, Kemmerlyn Lawrence, would have been entitled under North Carolina intestate succession law to take his intestate personal property. Such entitlement would make her dependent on the wage earner within the meaning of the Social Security Act.

11. As the child and dependent of the deceased wage earner, Kemmerlyn Lawrence is entitled to survivor's (child's) insurance benefits based on the deceased wage earner's earnings record.

DECISION

It is the decision of the Administrative Law Judge that, based on the application filed on September 24, 1990, the claimant is entitled to survivor's (child's) insurance benefits under sections 202(d)(1) and 216(h)(2)(A) of the Social Security Act.

Gordon H. Mahley, Jr.
Administrative Law Judge

4-14-92
Date

R/a

OPINION

SUPREME COURT OF THE UNITED STATES

ALEXIS LAWRENCE, GUARDIAN AND NEXT FRIEND ON BEHALF OF KEMMERLYN D. LAWRENCE, A MINOR

v.

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

(H) No. 94-9323. Decided January 8, 1996

PER CURIAM.

Under the Social Security Act, the unmarried minor "child" of a deceased individual who was insured under the Act may receive survivors' benefits if she was "dependent upon such individual" prior to his death. 49 Stat. 623, as amended, 42 U. S. C. §402(d)(1)(C) (1988 ed.). In order to determine whether a claimant is, for these purposes, the "child" of the deceased, and, as such, eligible to receive benefits, the Commissioner of Social Security "shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which [the] insured individual . . . was domiciled at the time of his death." 42 U. S. C. §416(h)(2)(A) (1988 ed.).

The petitioner in this case, Lawrence, asserts an entitlement to benefits under these provisions. In so doing, she acknowledges that the relevant state law, that of North Carolina, appears on its face to defeat her claim by imposing procedural requirements on proof of paternity (which it requires as a prerequisite for intestate succession) which she cannot meet. She contends, however, that these difficulties can be overcome in her case as they were in *Handley* v. *Schweiker*, 697 F. 2d 999 (1983). In that case, the Court of Appeals for the

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Eleventh Circuit held that state law requirements of proof of paternity can only be applied against a claimant for benefits under §416(h)(2)(A) insofar as they are constitutional, and that an Alabama law similar to the North Carolina law involved here was unconstitutional. In contrast, in the case before us, the Court of Appeals for the Fourth Circuit upheld the Social Security Administration's Appeals Council's denial of benefits to Lawrence. The Court of Appeals expressly adopted the rationale for rejecting her claim that the Government advanced in its brief to that court: that the constitutionality of a state paternity law need not be considered before applying it to determine entitlement to benefits under the federal statutory scheme. Lawrence petitioned for certiorari to review that decision.

In his response, the Solicitor General advises us that the "Social Security Administration has re-examined" the role of state paternity and intestacy laws in the federal benefits scheme, and now interprets the Social Security Act as "requir[ing] a determination, at least in some circumstances, of whether the state intestacy statute is constitutional." Brief for Respondent 8. He also correctly notes that the Act directs the Commissioner of Social Security—not, in the first instance, the courts—to "apply such law as would be applied . . . by the courts of the State" concerned. §416(h)(2)(A). Without conceding Lawrence's ultimate entitlement to benefits, he invites us to grant certiorari, vacate the judgment below, and remand the case (GVR) so that the Court of Appeals may either decide it in light of the Commissioner's new statutory interpretation or remand the case to the Commissioner for reconsideration in light of that interpretation. We conclude both that we have the power to issue a GVR order, and that such an order is an appropriate exercise of our discretionary certiorari jurisdiction.

Title 28 U. S. C. §2106 appears on its face to confer upon this Court a broad power to GVR: "The Supreme Court or any other court of appellate jurisdiction may

. . . vacate . . . any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and . . . require such further proceedings to be had as may be just under the circumstances." In his dissent issued today in this case and in *Stutson* v. *United States*, No. 94–8988, another case in which we issue a GVR order, JUSTICE SCALIA contends that "traditional practice" and "the Constitution and laws of the United States" impose "implicit limitations" on this power. *Post,* at 2. We respectfully disagree. We perceive no textual basis for such limitations. The Constitution limits our "appellate Jurisdiction" to issues of "[federal] Law and Fact," see Art. III, §2, but leaves to Congress the power to "ordain and establish . . . inferior Courts," Art. III, §1, and to make "Exceptions" and "Regulations" limiting and controlling our appellate jurisdiction. Insofar as Congress appears to have authorized such action, we believe that this Court has the power to remand to a lower federal court any case raising a federal issue which is properly before us in our appellate capacity.

Our past practice affirms this conclusion. Although, as JUSTICE SCALIA's dissent explains, *post,* at 3–7, the *exercise* of our GVR power was, until recent times, rare, its infrequent early use may be explained in large part by the smaller size of our certiorari docket in earlier times. Regardless of its earlier history, however, the GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices. We have GVR'd in light of a wide range of developments, including our own decisions, see *post,* at 4–5 (SCALIA, J., dissenting), state supreme court decisions, see, *e.g.*, *Conner* v. *Simler,* 367 U. S. 486 (1961), new federal statutes, see, *e.g.*, *Sioux Tribe of Indians* v. *United States,* 329 U. S. 685 (1946), administrative reinterpretations of federal statutes, see, *e.g.*, *Schmidt* v. *Espy*, 513 U. S. ___ (1994), new state statutes, see, *e.g.*, *Louisiana* v. *Hays,* 512 U. S. ___ (1994), changed factual circum-

stances, see, *e.g., National Labor Relations Bd.* v. *Federal Motor Truck Co.*, 325 U. S. 838 (1945) (demilitarization of employees), and confessions of error or other positions newly taken by the Solicitor General, see, *e.g., Wells* v. *United States*, 511 U. S. ___ (1994); *Reed* v. *United States*, 510 U. S. ___ (1994); *Ramirez* v. *United States*, 510 U. S. ___ (1994); *Chappell* v. *United States*, 494 U. S. 1075 (1990); *Polsky* v. *Wetherill*, 403 U. S. 916 (1971), and state attorneys general, see, *e.g., Cuffle* v. *Avenenti*, 498 U. S. 996 (1990); *Nicholson* v. *Boles*, 375 U. S. 25 (1963).

This practice has some virtues. In an appropriate case, a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before we rule on the merits, and alleviates the "[p]otential for unequal treatment" that is inherent in our inability to grant plenary review of all pending cases raising similar issues, see *United States* v. *Johnson*, 457 U. S. 537, 556, n. 16 (1982); cf. *Griffith* v. *Kentucky*, 479 U. S. 314, 323 (1987) ("we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final"). Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate. Whether a GVR order is ultimately appropriate depends further on the equities of the case: if it appears that the intervening development, such as a confession of error in some but not all aspects of the decision below, is part of an unfair or manipulative litigation strategy, or if the delay and further cost

entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate. This approach is similar in its flexibility to this Court's longstanding approach to applications for stays and other summary remedies granted without determining the merits of the case under the All Writs Act, 28 U. S. C. §1651. See, *e.g., Heckler* v. *Lopez*, 463 U. S. 1328 (1983) (REHNQUIST, J., in chambers) (staying a District Court order pending the decision on the merits of the Court of Appeals). (Naturally, because GVR orders are premised on matters that we have reason to believe the court below did not fully consider, and because they require only further consideration, the standard that we apply in deciding whether to GVR is somewhat more liberal than the All Writs Act standard, under which relief is granted only upon a showing that a grant of certiorari and eventual reversal are probable, see *id.*, at 1330.) Used in accordance with this approach, the GVR order can improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit our plenary review.

JUSTICE SCALIA's dissent would confine GVR's to three categories of case:

> "(1) where an intervening factor has arisen that has a legal bearing upon the decision, (2) where, in a context not governed by *Michigan* v. *Long*, [463 U. S. 1032 (1983)], clarification of the opinion below is needed to assure our jurisdiction, and (3) . . . where the respondent or appellee confesses error in the judgment below." *Post*, at 16.

While a large proportion of this Court's GVR orders fall within these categories, we find that, especially as the dissent construes them, they are too narrow to account for the full extent of our actual practice. We find two aspects in particular of the dissent's approach too restrictive. First, the dissent would insist that only

matters that the lower court had no "opportunity" to consider can be the basis for GVR orders. Second, it would impose special restrictions as to when the Court may GVR in light of changes of position by litigants.

JUSTICE SCALIA's dissent concedes—correctly, we believe—that its first category—"intervening factor[s]"—must be extended to include at least Supreme Court decisions rendered so shortly before the lower court's decision that the lower court had no "opportunity" to apply them. *Post*, at 5. The dissent does not explain, however, why what the lower court had an "opportunity" to consider should be decisive, or how its "opportunity" is to be assessed. In *Robinson* v. *Story*, 469 U. S. 1081 (1984), we GVR'd for further consideration in light of a Supreme Court decision rendered almost three months *before* the summary affirmance by the Court of Appeals that was the subject of the petition for certiorari. Were those three months sufficient "opportunity" for the court to apprise itself (or be apprised by the parties) of the new, potentially relevant Supreme Court decision? If *Robinson* was properly GVR'd, we have difficulty understanding the dissent's objection to our GVR order today in *Stutson*, where, as in *Robinson*, the Court of Appeals wrote no opinion to show whether or how it considered a precedent of ours that the District Court had had no opportunity to consider. In both cases, the Court of Appeals "*might* (or might not) have relied on a standard [nonapplication of the prior Supreme Court decision] that *might* (or might not) be wrong [and] that *might* (or might not) have affected the outcome." *Post*, at 9 (SCALIA, J., dissenting). The only pertinent difference that we can discern between the two cases is that the recent Supreme Court precedent was briefed to the Court of Appeals in *Stutson*, but we have never held lower court briefing to bar our review and vacatur where the lower court's order shows no sign of having applied the precedents that were briefed. Compare *post*, at 10 (asserting that "we have no power" to vacate and remand in *Stutson* after relevant briefing and a summary order below) with, *e.g.*, *Netherland* v. *Tuggle*, 515 U. S. ___ (Sept. 14, 1995) *(per curiam)* (vacating Court of Appeals' summary order staying execution for probable failure to apply a 12-year-old Supreme Court precedent which the parties briefed to the Court of Appeals; this Court itself granted a stay a week later, applying that precedent, see *Tuggle* v. *Netherland*, 515 U. S. ___, (Sept. 21, 1995)). As the prevalence of summary dispositions by the Courts of Appeals continues to increase with the burgeoning federal docket—in 1994, over 11% of Court of Appeals decisions on the merits,[1] and many more procedural decisions, were summary—such cases will, no doubt, arise more frequently. In this context, it is important that the meaningful exercise of this Court's appellate powers not be precluded by uncertainty as to what the court below "*might* . . . have relied on." And we are well aware, as are Supreme Court practitioners and lower courts, that while not immune from our plenary review, ambiguous summary dispositions below tend, by their very nature, to lack the precedential significance that we generally look for in deciding whether to exercise our discretion to grant plenary review. We are therefore more ready than the dissent to issue a GVR order in cases in which recent events have cast substantial doubt on the correctness of the lower court's summary disposition.

With regard to confessions of error and other changes of position by litigants, we agree on several points. All Members of the Court are agreed that we "should [not] mechanically accept any suggestion from the Solicitor General that a decision rendered in favor of the Government by a United States Court of Appeals was in error," *Mariscal* v. *United States*, 449 U. S. 405, 406 (1981) (REHNQUIST, J., dissenting). And the dissent acknowl-

[1]See Administrative Office of United States Courts, Reports of Proceedings of Judicial Conference of the United States, 1994, table S-3 (3,080 out of 27,219 decisions on the merits).

edges as "well entrenched," *post*, at 7 (SCALIA, J., dissenting), our practice of GVR'ing in light of plausible confessions of error without determining their merits. Moreover, the dissent is ready in principle to GVR in light of a new agency interpretation of a statute that is entitled to deference under the rule of *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). *Post*, at 11.

In other respects, however, our approaches to changes of position by litigants diverge. JUSTICE SCALIA'S dissent disapproves (although it acknowledges) this Court's well-established practice of GVR'ing based on confessions of error that do not purport to concede the whole case. *Post*, at 7, 9; cf., *e.g.*, *Moore* v. *United States*, 429 U. S. 20 (1976) (GVR'ing based on the Solicitor General's confession of error, notwithstanding the Solicitor General's unresolved claim that the error was harmless). The dissent would apparently insist that such GVR's be confined to cases in which the confession of error concerns a "legal point on which the lower court explicitly relied," or on which we otherwise "know" for certain that the lower court's judgment rested. *Post*, at 9. But, given the legitimacy of GVR's on the basis of confessions of error without determining the merits, we do not understand why a reasonable probability that the lower court relied on the point at issue should not suffice. As we have explained, *supra*, at 4, we have GVR'd on the basis of a reasonable probability of a change in result in nonconfession of error cases, see, *e.g.*, *Robinson* v. *Story*, *supra*. We see no special reason why, in a confession of error case, a *certainty* that the lower court relied on the point in question should be necessary before we may GVR on the basis of a *reasonable probability* that giving the lower court the opportunity to consider that point anew will alter the result.

Similarly, we reject JUSTICE SCALIA'S dissent's other requirement of certainty for GVR's founded on a change of position by the Government. The dissent accepts in principle that a new interpretation of a statute adopted

by the agency charged with implementing it may be entitled to deference in the context of litigation to which the Government is a party. But the dissent would require that before such new interpretation may be the basis for a GVR order, we must be "*certain* that the change in position is legally cognizable," *post*, at 12 (emphasis added), in the sense that it is "entitled to deference," *post*, at 11, despite its timing, in that particular case. This requirement, too, appears to be confined to cases in which the event on which the GVR is based is a change of position by the Government, see *post*, at 11–12; we do not, for example, understand the dissent to contend that a similar requirement of "lega[l] cognizab[ility]" should apply to GVR's in habeas corpus cases in which the procedural bar that we recognized in *Teague* v. *Lane*, 489 U. S. 288 (1989), might apply. Again, we do not understand the rationale for imposing such special requirements on GVR's based on a change of position. If it appears reasonably probable that a confession of error reveals a genuine and potentially determinative error by the court below, a GVR may be appropriate; similarly, we believe that if an agency interpretation is reasonably probably entitled to deference and potentially determinative, we may GVR in light of it. It is precisely because of uncertainty that we GVR. We do not see why uncertainty as to the "lega[l] cognizab[ility]" of an agency interpretation in a particular case should be treated differently from uncertainty as to its application in that case. Indeed, to determine on the merits whether deference is owed to the agency interpretation, based on a circumstance—*i.e.*, its timing with respect to the case at hand—that will not be present in any other case brought under the statute at issue, when the Court of Appeals has had no "opportunity" to consider the new agency interpretation, appears to us to defeat the purpose of GVR'ing. Rather, we think it appropriate to apply our normal "reasonable probability" test, and to defer any special concerns about strategic litigating behavior that are raised by changes in the

Government's position to consideration of the equities. Under our approach, neither uncertainty as to whether the Government's change of position, if accepted, would be outcome-determinative, nor uncertainty as to the "lega[l] cognizab[ility]" of an administrative interpretation, preclude a GVR if the overall probabilities and equities support the GVR order. Indeed, we issued just such a GVR order last Term, without recorded dissent. See *Schmidt* v. *Espy*, 513 U. S. ___ (1994) (GVR on the basis of the Solicitor General's representation that "[a]fter further examination of the regulation and its application in the present case, . . . the Department of Agriculture has determined that petitioners' lease-back/buyback application should be reconsidered without respect to the good faith requirement," Brief for Respondent in *Schmidt* v. *Espy*, O. T. 1994, No. 93–1707, p. 7; see also *id.*, at 10, n. 5 (maintaining that other obstacles to petitioners' application might remain)).

Our differences with JUSTICE SCALIA's dissent should not overshadow the substantial level of agreement shared by all Members of this Court. On the one hand, all are agreed that a wide range of intervening developments, including confessions of error, may justify a GVR order. On the other hand, all are agreed that our GVR power should be exercised sparingly. This Court should not just GVR a case "because it finds the opinion, though arguably correct, incomplete and unworkmanlike; or because it observes that there has been a post-judgment change in the personnel of the state supreme court, and wishes to give the new state justices a shot at the case." *Post*, at 14 (SCALIA, J., dissenting); accord, *Alvarado* v. *United States*, 497 U. S. 543, 545 (1990) (REHNQUIST, C. J., dissenting). Respect for lower courts, the public interest in finality of judgments, and concern about our own expanding certiorari docket all counsel against undisciplined GVR'ing. It remains to apply these principles to the facts of this case.

The feature of this case that, in our view, makes a GVR order appropriate is the new interpretation of the

Social Security Act that the Solicitor General informs us that the Social Security Administration, the agency charged with implementing that Act, has adopted. As JUSTICE SCALIA's dissent notes, *post*, at 11, we have not settled whether and to what extent deference is due to an administrative interpretation—its "lega[l] cognizab[ility]"—in a case that has already reached the appeal or certiorari stage when that interpretation is adopted. But in our view, see *supra*, at 8–9, such uncertainty does not preclude a GVR. Indeed, it is precisely because we are uncertain, without undertaking plenary analysis, of the legal impact of a new development, especially one, such as the present, which the lower court has had no opportunity to consider, that we GVR. Here, as in *Schmidt*, *supra*, the Solicitor General has recommended judicial reconsideration of the merits, while not conceding the petitioner's ultimate entitlement to statutory benefits, based on a new statutory interpretation that will apparently be applied, and will probably be entitled to deference, in future cases nationwide. Here, as in *Schmidt*, our summary review leads us to the conclusion that there is a reasonable probability that the Court of Appeals would conclude that the timing of the agency's interpretation does not preclude the deference that it would otherwise receive, and that it may be outcome-determinative in this case. A GVR order is, therefore, appropriate, subject to the equities.

As to the equities, it seems clear that they favor a GVR order here. That disposition has the Government's express support, notwithstanding that its purpose is to give the Court of Appeals the opportunity to consider an administrative interpretation which appears contrary to the Government's narrow self-interest. And the Government has informed us that it intends to apply that interpretation to future cases nationwide. Giving Lawrence a chance to benefit from it furthers fairness by treating Lawrence like other future benefits applicants. We acknowledge the dissent's concern that postlitigation interpretations may be the product of

unfair or manipulative Government litigating strategies, see *post*, at 11, and we therefore view late changes of position by the Government with some skepticism. That *general* concern does not, however, appear to us to require that we deprive Lawrence of the benefit of a favorable administrative reinterpretation in these *particular* circumstances. We believe, therefore, that the equities and legal uncertainties of this case together merit a GVR order.[2]

Accordingly, the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of the position taken in the brief for respondent filed by the Solicitor General, August 17, 1995.

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[2]In a letter filed on October 24, 1995, the Solicitor General advised this Court of a July 1995 amendment to the North Carolina paternity statute, N. C. Gen. Stat. §49–14(c). We find it unnecessary to decide whether this development independently justifies our GVR order. The Court of Appeals is free to consider its significance on remand.

SUPREME COURT OF THE UNITED STATES

94–8988 (5) ANTHONY LEO STUTSON
v.
UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

94–9323 (5) ALEXIS LAWRENCE, GUARDIAN AND NEXT FRIEND ON BEHALF OF KEMMERLYN D. LAWRENCE, A MINOR
v.
SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 94–8988 AND 94–9323. Decided January 8, 1996

JUSTICE STEVENS, concurring.

The Court persuasively explains why we have "the power to remand to a lower federal court any case raising a federal issue which is properly before us in our appellate capacity." No. 94–9323, at 3. That conclusion comports with a primary characteristic—and, I believe, virtue—of our discretionary authority to manage our certiorari docket: our ability to apply the "totality-of-the-circumstances" approach that JUSTICE SCALIA finds objectionable. *Post,* at 15. The Court's wise disposition of these petitions falls squarely within the best traditions of its administration of that docket. I therefore join the Court's opinions.

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CHIEF JUSTICE REHNQUIST, concurring in No. 94–9323 and dissenting in No. 94–8988.

I agree, for the reasons given by JUSTICE SCALIA, that the Court is mistaken in vacating the judgment in No. 94–8988, *Stutson* v. *United States*. I also agree with much of the rest of JUSTICE SCALIA's dissent, but I do not agree with that portion *post*, at 3–4, dealing with what he describes as "situations calling forth the special deference owed to state law and state courts in our system of federalism." Of the three cases which he cites for this proposition, one, *Missouri ex rel. Wabash R. Co.* v. *Public Serv. Comm'n*, 273 U. S. 126 (1927), came to this Court on writ of error and therefore was required to be decided on the merits. The second, *State Farm Mut. Automobile Ins. Co.* v. *Duel*, 324 U. S. 154 (1945), came to us on appeal from a State Supreme Court, and was thus also required to be decided on the merits. The third, *Huddleston* v. *Dwyer*, 322 U. S. 232 (1944), was

a case in which certiorari had already been granted, and the case argued on the merits. None of them, then, involved a choice between denying certiorari, on the one hand, and simply vacating the judgment of the lower court without any opinion, on the other. Vacating a judgment without explanation when the alternative is to simply deny certiorari involves at best the correction of perceived error made by the lower courts. In this connection, we would do well to bear in mind the admonition of Chief Justice William Howard Taft, one of the architects of the Certiorari Act of 1925, as described by his biographer:

> "It was vital, he said in opening his drive for the Judges' bill, that cases before the Court be reduced without limiting the function of pronouncing 'the last word on every important issue under the Constitution and the statutes of the United States.' A Supreme Court, on the other hand, should not be a tribunal obligated to weigh justice among contesting parties.
>
> 'They have had all they have a right to claim,' Taft said, 'when they have had two courts in which to have adjudicated their controversy.'" 2 H. Pringle, The Life and Times of William Howard Taft 997–998 (1939).

I agree with the decision announced in the *per curiam* to vacate the judgment of the Court of Appeals for the Fourth Circuit in No. 94–9323, *Lawrence* v. *Chater*. Whether or not the change of position by the Social Security Administration is "cognizable," in the words of JUSTICE SCALIA, *post*, at 11, it is perfectly reasonable to request the Court of Appeals to answer that question in the first instance.

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JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I dissent because I believe that the dispositions in both No. 94–8988 and No. 94–9323 are improper extensions of our limited power to vacate without first finding error below.

It sometimes occurs that, after having considered the lower court decision and found error, an appellate court merely reverses or vacates and then remands—that is, it sets the judgment aside and sends the case back to the lower court for further proceedings, rather than entering or directing entry of judgment for the appellant or petitioner. That is the appropriate course whenever the finding of error does not automatically entitle the appellant or petitioner to judgment, and the appellate court cannot conduct (or chooses not to conduct) the further inquiry necessary to resolve the questions remaining in the litigation. Our books are full of such

cases, from *Glass* v. *Sloop Betsey*, 3 Dall. 6 (1794), and *Clarke* v. *Russel*, 3 Dall. 415 (1799), to *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. ___ (1995), and *Tuggle* v. *Netherland*, 516 U. S. ___ (1995).

What is at issue here, however, is a different sort of creature, which might be called "no-fault V&R": vacation of a judgment and remand *without* any determination of error in the judgment below. In our discretionary certiorari system of review, such an order has acquired the acronym "GVR"—for the Court *grants* certiorari, *vacates* the judgment below, and *remands* for further proceedings.[1] The question presented by today's cases is whether there is any limitation (other than the mandate "do what is fair") upon this practice. The Court's *per curiam* opinions answer "no"; I disagree.

Title 28 U. S. C. §2106 provides that "[t]he Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." This facially unlimited statutory text is subject to the implicit limitations imposed by traditional practice and by the nature of the appellate system created by the Constitution and laws of the United States. The inferior federal courts (to say nothing of state courts) are not the creatures and agents

[1] I emphasize that what is at issue here is our power to set aside a valid judgment—*not*, as JUSTICE STEVENS' concurrence would have it, "our discretionary authority to manage our certiorari docket." *Ante*, at 1. We do the latter by accepting or declining review. But "[w]henever this Court grants certiorari and vacates a court of appeals judgment in order to allow that court to reconsider its decision . . . , the Court *is acting on the merits*." *Board of Trustees of Keene State College* v. *Sweeney*, 439 U. S. 24, 25–26 (1978) (STEVENS, J., dissenting) (emphasis added). Thus, today's orders go far beyond what JUSTICE STEVENS now refers to as "administration of [our certiorari] docket." *Ante*, at 1.

of this body—as are Masters, whose work we may reject and send back for redoing at our own pleasure. Inferior courts are separately authorized in the Constitution, see Art. I, §8; Art. III, §1, created by Acts of Congress, see, *e.g.*, Judiciary Act of 1789, 1 Stat. 73; Evarts Act, Act of Mar. 3, 1891, 26 Stat. 826, and staffed by judges whose manner of appointment and tenure of office are the same as our own, see U. S. Const., Art. II, §2; Art. III, §1; 28 U. S. C. §§44, 133, 134. Despite the unqualified language of §2106, we cannot, for example, "reverse" a judgment of one of these courts "and direct the entry" of a different judgment whenever we disagree with what has been done, but only when we can identify a controlling error of law. And I think we cannot "vacate" and "remand" in the circumstances here.

The Court today seeks to portray our "no-fault V&R" practice as traditionally covering a kaleidoscopic diversity of situations. See No. 94–9323, at 3–4. That is in my view a misportrayal; the practice has always been limited to a few discrete categories of cases. It began, apparently, in situations calling forth the special deference owed to state law and state courts in our system of federalism. In *Missouri ex rel. Wabash R. Co.* v. *Public Serv. Comm'n*, 273 U. S. 126 (1927), for example, rather than find error on the basis of the federal constitutional claims raised, this Court set aside the judgment of the Missouri Supreme Court and remanded the case to that court for further proceedings so that it could consider the meaning and effect of a state statute that had been enacted after its judgment had been entered. We reasoned that "[w]hile this Court may decide these [state-law] questions, it is not obliged to do so, and in view of their nature, we deem it appropriate to refer the determination to the state court." *Id.*, at 131. In other words, we left it to the state court to decide the effect of the intervening event, rather than follow our usual practice of deciding that question for ourselves, see, *e.g.*, *Steamship Co.* v. *Joliffe*, 2 Wall. 450, 456–458 (1865). See generally *United*

States v. *Schooner Peggy*, 1 Cranch 103, 110 (1801) ("if, subsequent to the judgment [entered by a lower court], and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied"). Later cases took the same deferential approach to state courts when the intervening event consisted of one of our own opinions. See, *e.g.*, *State Tax Comm'n* v. *Van Cott*, 306 U. S. 511 (1939). By 1945, we could state that it was "[a] customary procedure" for the Court "to vacate the judgment of [a] state court where there has been a supervening event since its rendition which alters the basis upon which the judgment rests, and to remand the case so that the court from which it came might reconsider the question in light of the changed circumstances." *State Farm Mut. Automobile Ins. Co.* v. *Duel*, 324 U. S. 154, 161 (1945). Similarly, where a federal court of appeals' decision on a point of state law had been cast in doubt by an intervening state supreme court decision, it became our practice to vacate and remand so that the question could be decided by judges "familiar with the intricacies and trends of local law and practice." *Huddleston* v. *Dwyer*, 322 U. S. 232, 237 (1944).

The "intervening event" branch of our "no-fault V&R" practice has been extended to the seemingly analogous situation (though *not* one implicating the special needs of federalism) in which an intervening event (ordinarily a postjudgment decision of this Court) has cast doubt on the judgment rendered by a lower federal court or a state court concerning a *federal* question. See, *e.g.*, *Amer* v. *Superior Court of Cal., County of Los Angeles*, 334 U. S. 813 (1948); *Goldbaum* v. *United States*, 348 U. S. 905 (1955); *Henry* v. *City of Rock Hill*, 376 U. S. 776 (1964). This is undoubtedly the largest category of "GVRs" that now exists. See, *e.g.*, *Exxon Corp.* v. *Youell*, 516 U. S. ___ (1995); *Kapoor* v. *United States*, 516 U. S. ___ (1995); *Edmond* v. *United States*, 516 U. S. ___ (1995); *Pacesetter Constr. Co.* v. *Carpenters 46 Northern Cal. Ctys. Conference Bd.*, 516 U. S. ___ (1995); *Doctor's Assocs., Inc.* v. *Casarotto*, 515 U. S. ___ (1995); *Calamia* v. *Singletary*, 514 U. S. ___ (1995). We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted *in order that* (if appropriate) they may be "GVR'd" when the case is decided. More recently, we have indulged in the practice of vacating and remanding in light of a decision of ours that *preceded* the judgment in question, but by so little time that the lower court might have been unaware of it. See, *e.g.*, *Grier* v. *United States*, 419 U. S. 989 (1974). These applications of "no-fault V&R" have nothing to do with federalism, but they are appropriate to preserve the operational premise of a multitiered judicial system (viz., that lower courts will have the first opportunity to apply the governing law to the facts) and to avoid the unseemliness of holding judgments to be in error on the basis of law that did not exist when the judgments were rendered below. They thus serve the interests of efficiency and of concern for the dignity of state and lower federal tribunals.

An entirely separate branch of our "no-fault V&R" jurisprudence, but again one that originates in the special needs of federalism, pertains to decisions of state supreme courts that are ambiguous as to whether they rest on state-law or federal-law grounds. Rather than run the risk of improperly reversing a judgment based on state law, we adopted the practice of vacating and remanding so that the state court could make the reasons for its judgment clear. See, *e.g.*, *Minnesota* v. *National Tea Co.*, 309 U. S. 551 (1940); *Department of Mental Hygiene of Cal.* v. *Kirchner*, 380 U. S. 194 (1965).[2]

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[2]In *Michigan* v. *Long*, 463 U. S. 1032 (1983), we largely supplanted this policy with the rule that state-court decisions discussing federal law will be presumed to be based on federal law unless the

We have "GVR'd" with increasing frequency in recent years on the basis of suggestions or representations made by the Solicitor General. Some of these cases are nothing more than examples of the "intervening-event GVR" discussed above, the Solicitor General pointing out that a case or statute has intervened since the judgment below. See, *e.g.*, *Woods* v. *Durr*, 336 U. S. 941 (1949); *Altiere* v. *United States*, 382 U. S. 367 (1966). We have also announced "no-fault GVRs," however, when there has been no intervening development other than the Solicitor General's confession of error in the judgment. That is a relatively new practice. As recently as 1942 a unanimous Court (two Justices not participating) wrote the following:

> "The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent. But such a confession does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed. . . . Furthermore, our judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of the parties . . . ." *Young* v. *United States*, 315 U. S. 257, 258–259 (1942).

Cf. *U. S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U. S. ___ (1994) (setting aside of a valid judicial judgment should not turn upon agreement of the parties). Many of the early "GVRs" based upon the Government's confession of error appear not to have been "no-fault V&Rs" at all, but rather summary decisions on the merits, with remand for further proceedings. See, *e.g.*, *Chiarella* v. *United States*, 341 U. S. 946 (1951) ("*[u]pon consideration of the record* and the confession of error by the Solicitor General," remanding to the District Court for resentencing) (emphasis added); *Penner* v. *United States*, 399 U. S. 522 (1970) ("[o]n the basis of a confession of error by the Solicitor General and of an independent review of the record," remanding to the District Court "with instructions to dismiss the indictment").

Our recent practice, however, has been to remand in light of the confession of error without determining the merits, leaving it to the lower court to decide if the confession is correct. As late as 1981, the current Chief Justice, joined by Justice White, objected to this practice. See *Mariscal* v. *United States*, 449 U. S. 405, 407 (1981) (REHNQUIST, J., dissenting) ("I harbor serious doubt that our adversary system of justice is well served by . . . routinely vacating judgments which the Solicitor General questions without any independent examination of the merits on our own"). I agree with that position. The practice is by now well entrenched, however. See, *e.g.*, *Reed* v. *United States*, 510 U. S. ___ (1994); *Ramirez* v. *United States*, 510 U. S. ___ (1994). It may be considered a separate category of "no-fault V&R."

Finally (and most questionably) we have in very recent years "GVR'd" where the Solicitor General has *not* conceded error in the judgment below, but has merely acknowledged that the ground, or one of the grounds, on which the lower court relied was mistaken. See, *e.g.*, *Alvarado* v. *United States*, 497 U. S. 543 (1990); *Chappell* v. *United States*, 494 U. S. 1075 (1990). That is in my view a mistaken practice, since we should not assume that a Court of Appeals has adopted a legal position only because the Government supported it.

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contrary is clear from the face of the opinion. *Id.*, at 1037–1044; see also *Arizona* v. *Evans*, 514 U. S. ___, ___–___ (1995) (reaffirming this approach). But cf. *Capital Cities Media, Inc.* v. *Toole*, 466 U. S. 378 (1984) (post-*Long* decision vacating and remanding for clarification of state supreme court decision rendered without opinion).

Four Justices now sitting on the Court have disapproved this sort of "GVR." See *Alvarado*, *supra*, at 545 (REHNQUIST, C. J., joined by O'CONNOR, SCALIA, and KENNEDY, JJ., dissenting).[3]

Today's cases come within none of these categories of "no-fault V&R," not even the questionable last one. In No. 94–8988, the decision "in light of" which we vacate the judgment and remand, *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 507 U. S. 380 (1993), had been on the books for well more than a year before the Eleventh Circuit announced the judgment under review, and for almost two years before that court denied rehearing. Moreover, the parties *specifically argued* to the Court of Appeals the question whether *Pioneer* established the standard applicable to petitioner's claim of "excusable neglect" under Federal Rule of Appellate Procedure 4(b), with the United States disagreeing with petitioner and taking the position that *Pioneer* was *not* controlling. The Eleventh Circuit ruled against petitioner on the merits of his claim; its one-sentence order contained neither a reference to *Pioneer* nor any suggestion that the court viewed the case as turning on which party's proffered standard was applied.

The United States has now revised its legal position and—though it makes no suggestion that the Court of Appeals' judgment was incorrect—is of the view that *Pioneer does* establish the standard governing

[3]The Court misdescribes my position when it states that I would limit "GVRs" "based on confessions of error that do not purport to concede the whole case" to "cases in which the confession of error concerns a 'legal point on which the lower court explicitly relied.'" No. 94–9323, at 8 (quoting *infra*, at 9). Both the text above and the sentence immediately following the phrase that the Court quotes from my dissent, see *infra*, at 9, make my position clear. The line of distinction I would draw—and the one long established in our practice—is between a respondent's concession of error *in the lower court's judgment* and a respondent's concession of error that goes not to the judgment but merely to an aspect of the reasoning below or of respondent's argument below.

petitioner's claim. But the fact that the party who won below repudiates on certiorari its position on a particular point of law does not give rise to any "intervening," postjudgment factor that must be considered. The law is the law, whatever the parties, including the United States, may have argued. As described above, we have sometimes "GVR'd" where the Government has, while still supporting the judgment in its favor, conceded the error of a legal point on which the lower court explicitly relied. As I have explained, see *supra*, at 7–8, in my view even that practice denies valid judgments the respect to which they are entitled. But the "GVR" in the present case goes still further. We do not know in this case whether the Eleventh Circuit even *agreed* with the Government's position that has now been repudiated; for all we know, the court *applied Pioneer* and found against petitioner under that standard. The judgment is declared invalid because the Eleventh Circuit *might* (or might not) have relied on a standard (non-*Pioneer*) that *might* (or might not) be wrong, that *might* (or might not) have affected the outcome, and that the Eleventh Circuit *might* (or might not) abandon (whether or not it is wrong) because the Government has now abandoned it. This seems to me beyond all reason.

The Court justifies its setting aside of the judgment on the ground that "we [do not] place an excessive burden on [the Eleventh Circuit], relative to [petitioner's] liberty and due process interests, by inviting it to clarify its ambiguous ruling." No. 94–8988, at 3. Vacating for ambiguity may be justifiable, as I have noted, when the ambiguity calls into question our very power to take and decide the case, see *supra*, at 5, and n. 2. But where that power is (as it is here) beyond doubt, it seems to me quite improper to vacate merely in order to get a better idea of whether the case is "worth" granting full review. If this is appropriate with respect to court of appeals' summary dispositions of criminal cases, I see no reason why it is not appropriate with respect to criminal dispositions accompanied by opinions as well. Or, for

that matter, why it is not appropriate for civil cases. "GVR'd for clarification of ____" should become a common form of order, drastically altering the role of this Court. In my view we have no power to make such a tutelary remand, as to a schoolboy made to do his homework again.[4] The Court insists that declining to remand for clarification would risk "immunizing summary dispositions . . . from our review," No. 94–8988, at 3. That is not so. It is fully within our power to review this case, and any other case summarily decided below, by granting certiorari and proceeding to consider the merits; or indeed, where the circumstances warrant, to summarily reverse. Cf. Hellman, "Granted, Vacated, and Remanded"—Shedding Light on a Dark Corner of Supreme Court Practice, 67 Judicature 389, 391–392 (1984) (noting that in the 1970's as the Court's "GVR" practice "increased far beyond what it had been in earlier years," its use of summary reversal based on intervening precedents decreased dramatically).

In No. 94–9323, the Court again "GVRs" because the Government has changed a legal position: the Commissioner of Social Security informs us that she now agrees with petitioner on a preliminary point of law that the Court of Appeals found in the Government's favor. And here again, respondent does not concede that the judgment below was in error, for she "ha[s] not . . . reached a firm conclusion" as to her position on the subsequent point of law that will (if her recantation on the preliminary point is accepted) control the outcome of the case. Brief for Respondent in No. 94–9323, p. 13.[5]

[4] *Netherland* v. *Tuggle*, 515 U. S. ___ (1995), upon which the Court relies, see No. 94–9323, at 6–7, is not to the contrary. That was not a "no-fault V&R," but a reversal of the lower court for abuse of discretion in its entry of a stay order.

[5] Because the Commissioner is not prepared to say that she disagrees with petitioner as to the proper disposition of this case, it is questionable whether any case or controversy subsists. Quite apart from the other difficulties with the course the Court has chosen, it seems to me we should not permit the Commissioner to trouble the Fourth Circuit again until she makes up her mind on this issue.

There is, however, a special factor in this second case: respondent is an agency head, whose view on the legal point in question is in some circumstances entitled to deference, see *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). If it were clear that respondent's change in position were entitled to deference, I would have no problem with the "GVR"; the new position would then constitute an intervening postjudgment factor whose effect the Court of Appeals should be allowed to consider. But even if we allow deference to an agency view first expressed in pending litigation (as some think we should not, see Anthony, Which Agency Interpretations Should Bind Citizens and the Courts?, 7 Yale J. Reg. 1, 60–61 (1990); cf. Merrill, Judicial Deference to Executive Precedent, 101 Yale L. J. 969, 1023 (1992)), surely a decent concern for those litigating against the Government and for our lower court judges should induce us to disregard, for *Chevron* purposes, a litigating position *first expressed at the certiorari stage*. The United States is the most frequent, and hence the most calculating, of our litigants. If we accord deference in the circumstances here, we can expect the Government to take full advantage of the opportunity to wash out, on certiorari, disadvantageous positions it has embraced below; and we can expect it to focus less of its energy upon getting its position "right" in the Courts of Appeals.

The Court, however, thinks it unnecessary to decide the deference question. It is enough, as the Court sees it, that its summary review has led it to "believe that [the] agency interpretation is reasonably probably entitled to deference and potentially determinative." No. 94–9323, at 9. I do not agree. It seems to me our "intervening-event GVRs" should not be extended to the situation where (1) the intervening event consists of a

party's going back on what it argued to the court of appeals, and (2) it is not even certain that the change in position is legally cognizable. That seems to me to accord inadequate respect to the work of our colleagues below. Moreover, it is not clear to me that the question before us (should an agency change of position at the certiorari stage be accorded deference?) *can even be reached* by the Court of Appeals. Surely we do not expect the Court of Appeals to declare our vacation and remand invalid. Thus, the Court of Appeals will have before it the somewhat *different* question whether the agency change of position *before it* is entitled to deference. I suppose it may conclude that, *since* a change of position on certiorari is not entitled to deference, a change of position on a remand triggered by change of position on certiorari is not entitled to deference—but that would assuredly be a convoluted holding. The question of what is permissible on certiorari seems to me peculiarly within the domain of this Court. Since we are in doubt on the deference point in the present case, we should either deny the petition, or grant it and have the deference point argued.

The Court's failure to comprehend why it should make any difference that the Government's changed litigating position may not be entitled to deference, see No. 94–9323, at 9, displays a lamentable lack of appreciation of the concept of adding insult to injury. It is disrespectful enough of a lower court to set its considered judgment aside because the Government has altered the playing field on appeal; it is downright insulting to do so when the Government's bait-and-switch performance *has not for a certainty altered any factor relevant to the decision*. In that situation, at least, we should let the Government live with the consequences of its fickleness or inattention. The Court claims that it would "defeat the purpose of GVR'ing" to determine the deference issue on the merits, since that issue is "based on a circumstance . . . that will not be present in any other case brought under the statute at issue." *Ibid.* That is true

enough (barring the unlikely event that the Government in a later case under this very statute again switches its position at the certiorari stage). But the issue of whether *Chevron* deference should be accorded to a certiorari-stage switch of litigating position is not at all unique to the individual case or bound up with the underlying statute. It always arises, of course, in an individual case involving a particular statute, as do most questions of law. But the issue itself is thoroughly generalizable, and of general importance. In any event, I do not urge that we determine the deference issue on the merits; my vote in these cases is to deny the petitions. Finally, I must remark upon the Court's assertion that we issued "just such a GVR order last Term, without recorded dissent," No. 94–9323, at 10, citing *Schmidt* v. *Espy*, 513 U. S. ___ (1994): It is not customary, but quite rare, to *record* dissents from grants of certiorari, including "GVRs." It would be wrong to conclude from the unsigned order in *Schmidt* that the vote to "GVR" was unanimous, or even close to unanimous. Thus, *Schmidt* does not demonstrate that bait-and-switch-deference "GVRs" are an accepted practice; but the fact that *Schmidt* was apparently the first-ever such "GVR," combined with the fact that the Government is back one Term later for another helping, demonstrates the accuracy of my prediction that the Solicitor General will be quick to take advantage of this new indulgence.

What is more momentous than the Court's judgments in the particular cases before us—each of which extends our prior practice just a little bit—is its expansive expression of the authority that supports those judgments. It acknowledges, to begin with, no constitutional limitation on our power to vacate lower court orders properly brought before us. No. 94–9323, at 3. This presumably means that the constitutional grant of "appellate Jurisdiction" over "Cases . . . arising under [the] Constitution [and] Laws of the United States," Art. III, §2, empowers the Court to vacate a state supreme

court judgment, and remand the case, because it finds the opinion, though arguably correct, incomplete and unworkmanlike; or because it observes that there has been a postjudgment change in the personnel of the state supreme court, and wishes to give the new state justices a shot at the case. I think that is not so. When the Constitution divides our jurisdiction into "original Jurisdiction" and "appellate Jurisdiction," I think it conveys, with respect to the latter, the traditional accoutrements of appellate power. There doubtless is room for some innovation, particularly such as may be necessary to adapt to a novel system of federalism; but the innovation cannot be limitless without altering the nature of the power conferred.

Not only does the Court reject any constitutional limitation upon its power to vacate; it is unwilling to submit to any prudential constraint as well. Even while acknowledging the potential for "unfair[ness] or manipulat[ion]" and professing to agree that "our GVR power should be exercised sparingly," No. 94–9323, at 4, 10, the Court commits to no standard that will control that power, other than that cloak for all excesses, "the equities," *id.*, at 4; see *id.*, at 10, 11–12; No. 94–8988, at 3. We may, as the Court now pronounces, set aside valid judgments not merely when they are wrong, not merely when intervening events require that someone (either the lower court or we) reconsider them on new facts or under new legal criteria, not merely when it is ambiguous whether we have power to review them, not merely when the United States concedes that the judgment below (or one of the points of law relied upon below, or even one of the points of law *possibly* relied upon below) is wrong; but whenever there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." No. 94–9323, at 4. The power to "revis[e] and correc[t]" for error, *Marbury* v. *Madison*, 1 Cranch 137, 175 (1803), has become a power to void for suspicion. Comparing the

modest origins of the Court's "no-fault V&R" policy with today's expansive *dénouement* should make even the most Pollyannish reformer believe in camel's noses, wedges, and slippery slopes.

The Court justifies its approach on the ground that it "alleviates the potential for unequal treatment that is inherent in our inability to grant plenary review of all pending cases raising similar issues." No. 94–9323, at 4 (internal quotation marks omitted). I do not see how it can promote equal treatment to announce a practice that we cannot possibly pursue in every case. If we were to plumb the "equities" and ponder the "errors" for all the petitions that come before us—if we were to conduct, for example, in all cases involving summary decisions, today's balancing of the "burden" to the Court of Appeals against the litigant's "interests" in having clarification of the ruling, see No. 94–8988, at 3, or today's calculation of "the overall probabilities and equities," No. 94–9323, at 10—we would have no time left for the cases we grant to consider on the merits. Of course we do not *purport* to conduct such inquiries, not even the basic one of whether the decision below is probably in "error"—which is why we insist that our denial of certiorari does not suggest a view on the merits, see, *e.g.*, *Teague* v. *Lane*, 489 U. S. 288, 296 (1989); *Singleton* v. *Commissioner*, 439 U. S. 942 (1978) (STEVENS, J., respecting the denial of the petition for writ of certiorari). Moreover, even if we tried applying the Court's "totality-of-the-circumstances" evaluation to all the petitions coming before us, we would be unlikely to achieve equal treatment. Such a plastic criterion is liable to produce inconsistent results in any series of decisions; it is virtually *guaranteed* to do so in a series of decisions made without benefit of adversary presentation (whether we should "GVR" is rarely briefed, much less argued—as it has not been here) and announced without accompaniment of a judicial opinion (we almost never give reasons as the Court has done today). The need to afford equal treatment argues precisely *against*

the "totality-of-the-circumstances" approach embraced by the Court, and in favor of a more modest but standardized "GVR" practice.

Henceforth, I shall vote for an order granting certiorari, vacating the judgment below without determination of the merits, and remanding for further consideration, only (1) where an intervening factor has arisen that has a legal bearing upon the decision, (2) where, in a context not governed by *Michigan* v. *Long*, 463 U. S. 1032 (1983), clarification of the opinion below is needed to assure our jurisdiction, and (3) (in acknowledgment of established practice, though not necessarily in agreement with its validity) where the respondent or appellee confesses error in the judgment below. (I shall not necessarily note my dissent from "GVRs" where those conditions do not exist.) As I have discussed, neither of the present cases meets these standards. Accordingly, I respectfully dissent from today's orders and would deny both petitions.

SUPREME COURT OF THE UNITED STATES

94–8988 ANTHONY LEO STUTSON
v.
UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ALEXIS LAWRENCE, GUARDIAN AND NEXT FRIEND ON BEHALF OF KEMMERLYN D. LAWRENCE, A MINOR
94–9323 *v.*
SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 94–8988 AND 94–9323. Decided January 8, 1996

JUSTICE STEVENS, concurring.

The Court persuasively explains why we have "the power to remand to a lower federal court any case raising a federal issue which is properly before us in our appellate capacity." No. 94–9323, at 3. That conclusion comports with a primary characteristic—and, I believe, virtue—of our discretionary authority to manage our certiorari docket: our ability to apply the "totality-of-the-circumstances" approach that JUSTICE SCALIA finds objectionable. *Post,* at 15. The Court's wise disposition of these petitions falls squarely within the best traditions of its administration of that docket. I therefore join the Court's opinions.

SUPREME COURT OF THE UNITED STATES

(9)

ANTHONY LEO STUTSON

94–8988 *v.*

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ALEXIS LAWRENCE, GUARDIAN AND NEXT FRIEND ON BEHALF OF KEMMERLYN D. LAWRENCE, A MINOR

94–9323 (9) *v.*

SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 94–8988 AND 94–9323. Decided January 8, 1996.

CHIEF JUSTICE REHNQUIST, concurring in No. 94–9323 and dissenting in No. 94–8988.

I agree, for the reasons given by JUSTICE SCALIA, that the Court is mistaken in vacating the judgment in No. 94–8988, *Stutson* v. *United States*. I also agree with much of the rest of JUSTICE SCALIA's dissent, but I do not agree with that portion *post*, at 3–4, dealing with what he describes as "situations calling forth the special deference owed to state law and state courts in our system of federalism." Of the three cases which he cites for this proposition, one, *Missouri ex rel. Wabash R. Co.* v. *Public Serv. Comm'n*, 273 U. S. 126 (1927), came to this Court on writ of error and therefore was required to be decided on the merits. The second, *State Farm Mut. Automobile Ins. Co.* v. *Duel*, 324 U. S. 154 (1945), came to us on appeal from a State Supreme Court, and was thus also required to be decided on the merits. The third, *Huddleston* v. *Dwyer*, 322 U. S. 232 (1944), was

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a case in which certiorari had already been granted, and the case argued on the merits. None of them, then, involved a choice between denying certiorari, on the one hand, and simply vacating the judgment of the lower court without any opinion, on the other. Vacating a judgment without explanation when the alternative is to simply deny certiorari involves at best the correction of perceived error made by the lower courts. In this connection, we would do well to bear in mind the admonition of Chief Justice William Howard Taft, one of the architects of the Certiorari Act of 1925, as described by his biographer:

> "It was vital, he said in opening his drive for the Judges' bill, that cases before the Court be reduced without limiting the function of pronouncing 'the last word on every important issue under the Constitution and the statutes of the United States.' A Supreme Court, on the other hand, should not be a tribunal obligated to weigh justice among contesting parties.
>
> 'They have had all they have a right to claim,' Taft said, 'when they have had two courts in which to have adjudicated their controversy.'" 2 H. Pringle, The Life and Times of William Howard Taft 997–998 (1939).

I agree with the decision announced in the *per curiam* to vacate the judgment of the Court of Appeals for the Fourth Circuit in No. 94–9323, *Lawrence* v. *Chater*. Whether or not the change of position by the Social Security Administration is "cognizable," in the words of JUSTICE SCALIA, *post*, at 11, it is perfectly reasonable to request the Court of Appeals to answer that question in the first instance.

SUPREME COURT OF THE UNITED STATES

94–8988 (10) ANTHONY LEO STUTSON
v.
UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

94–9323 (10) ALEXIS LAWRENCE, GUARDIAN AND NEXT FRIEND ON BEHALF OF KEMMERLYN D. LAWRENCE, A MINOR
v.
SHIRLEY S. CHATER, COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 94–8988 AND 94–9323. Decided January 8, 1996.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I dissent because I believe that the dispositions in both No. 94–8988 and No. 94–9323 are improper extensions of our limited power to vacate without first finding error below.

It sometimes occurs that, after having considered the lower court decision and found error, an appellate court merely reverses or vacates and then remands—that is, it sets the judgment aside and sends the case back to the lower court for further proceedings, rather than entering or directing entry of judgment for the appellant or petitioner. That is the appropriate course whenever the finding of error does not automatically entitle the appellant or petitioner to judgment, and the appellate court cannot conduct (or chooses not to conduct) the further inquiry necessary to resolve the questions remaining in the litigation. Our books are full of such

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cases, from *Glass* v. *Sloop Betsey*, 3 Dall. 6 (1794), and *Clarke* v. *Russel*, 3 Dall. 415 (1799), to *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. ___ (1995), and *Tuggle* v. *Netherland*, 516 U. S. ___ (1995).

What is at issue here, however, is a different sort of creature, which might be called "no-fault V&R": vacation of a judgment and remand *without* any determination of error in the judgment below. In our discretionary certiorari system of review, such an order has acquired the acronym "GVR"—for the Court *grants* certiorari, *vacates* the judgment below, and *remands* for further proceedings.[1] The question presented by today's cases is whether there is any limitation (other than the mandate "do what is fair") upon this practice. The Court's *per curiam* opinions answer "no"; I disagree.

Title 28 U. S. C. §2106 provides that "[t]he Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." This facially unlimited statutory text is subject to the implicit limitations imposed by traditional practice and by the nature of the appellate system created by the Constitution and laws of the United States. The inferior federal courts (to say nothing of state courts) are not the creatures and agents

[1] I emphasize that what is at issue here is our power to set aside a valid judgment—*not*, as JUSTICE STEVENS' concurrence would have it, "our discretionary authority to manage our certiorari docket." *Ante*, at 1. We do the latter by accepting or declining review. But "[w]henever this Court grants certiorari and vacates a court of appeals judgment in order to allow that court to reconsider its decision . . . , the Court *is acting on the merits*." *Board of Trustees of Keene State College* v. *Sweeney*, 439 U. S. 24, 25–26 (1978) (STEVENS, J., dissenting) (emphasis added). Thus, today's orders go far beyond what JUSTICE STEVENS now refers to as "administration of [our certiorari] docket." *Ante*, at 1.

of this body—as are Masters, whose work we may reject and send back for redoing at our own pleasure. Inferior courts are separately authorized in the Constitution, see Art. I, §8; Art. III, §1, created by Acts of Congress, see, *e.g.*, Judiciary Act of 1789, 1 Stat. 73; Evarts Act, Act of Mar. 3, 1891, 26 Stat. 826, and staffed by judges whose manner of appointment and tenure of office are the same as our own, see U. S. Const., Art. II, §2; Art. III, §1; 28 U. S. C. §§44, 133, 134. Despite the unqualified language of §2106, we cannot, for example, "reverse" a judgment of one of these courts "and direct the entry" of a different judgment whenever we disagree with what has been done, but only when we can identify a controlling error of law. And I think we cannot "vacate" and "remand" in the circumstances here.

The Court today seeks to portray our "no-fault V&R" practice as traditionally covering a kaleidoscopic diversity of situations. See No. 94–9323, at 3–4. That is in my view a misportrayal; the practice has always been limited to a few discrete categories of cases. It began, apparently, in situations calling forth the special deference owed to state law and state courts in our system of federalism. In *Missouri ex rel. Wabash R. Co.* v. *Public Serv. Comm'n*, 273 U. S. 126 (1927), for example, rather than find error on the basis of the federal constitutional claims raised, this Court set aside the judgment of the Missouri Supreme Court and remanded the case to that court for further proceedings so that it could consider the meaning and effect of a state statute that had been enacted after its judgment had been entered. We reasoned that "[w]hile this Court may decide these [state-law] questions, it is not obliged to do so, and in view of their nature, we deem it appropriate to refer the determination to the state court." *Id.*, at 131. In other words, we left it to the state court to decide the effect of the intervening event, rather than follow our usual practice of deciding that question for ourselves, see, *e.g.*, *Steamship Co.* v. *Joliffe*, 2 Wall. 450, 456–458 (1865). See generally *United*

States v. *Schooner Peggy*, 1 Cranch 103, 110 (1801) ("if, subsequent to the judgment [entered by a lower court], and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied"). Later cases took the same deferential approach to state courts when the intervening event consisted of one of our own opinions. See, *e.g.*, *State Tax Comm'n* v. *Van Cott*, 306 U. S. 511 (1939). By 1945, we could state that it was "[a] customary procedure" for the Court "to vacate the judgment of [a] state court where there has been a supervening event since its rendition which alters the basis upon which the judgment rests, and to remand the case so that the court from which it came might reconsider the question in light of the changed circumstances." *State Farm Mut. Automobile Ins. Co.* v. *Duel*, 324 U. S. 154, 161 (1945). Similarly, where a federal court of appeals' decision on a point of state law had been cast in doubt by an intervening state supreme court decision, it became our practice to vacate and remand so that the question could be decided by judges "familiar with the intricacies and trends of local law and practice." *Huddleston* v. *Dwyer*, 322 U. S. 232, 237 (1944).

The "intervening event" branch of our "no-fault V&R" practice has been extended to the seemingly analogous situation (though *not* one implicating the special needs of federalism) in which an intervening event (ordinarily a postjudgment decision of this Court) has cast doubt on the judgment rendered by a lower federal court or a state court concerning a *federal* question. See, *e.g.*, *Amer* v. *Superior Court of Cal., County of Los Angeles*, 334 U. S. 813 (1948); *Goldbaum* v. *United States*, 348 U. S. 905 (1955); *Henry* v. *City of Rock Hill*, 376 U. S. 776 (1964). This is undoubtedly the largest category of "GVRs" that now exists. See, *e.g.*, *Exxon Corp.* v. *Youell*, 516 U. S. ___ (1995); *Kapoor* v. *United States*, 516 U. S. ___ (1995); *Edmond* v. *United States*, 516 U. S. ___ (1995); *Pacesetter Constr. Co.* v. *Carpenters 46 Northern Cal. Ctys. Conference Bd.*, 516 U. S. ___ (1995); *Doctor's Assocs., Inc.* v. *Casarotto*, 515 U. S. ___ (1995); *Calamia* v. *Singletary*, 514 U. S. ___ (1995). We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted *in order that* (if appropriate) they may be "GVR'd" when the case is decided. More recently, we have indulged in the practice of vacating and remanding in light of a decision of ours that *preceded* the judgment in question, but by so little time that the lower court might have been unaware of it. See, *e.g.*, *Grier* v. *United States*, 419 U. S. 989 (1974). These applications of "no-fault V&R" have nothing to do with federalism, but they are appropriate to preserve the operational premise of a multitiered judicial system (viz., that lower courts will have the first opportunity to apply the governing law to the facts) and to avoid the unseemliness of holding judgments to be in error on the basis of law that did not exist when the judgments were rendered below. They thus serve the interests of efficiency and of concern for the dignity of state and lower federal tribunals.

An entirely separate branch of our "no-fault V&R" jurisprudence, but again one that originates in the special needs of federalism, pertains to decisions of state supreme courts that are ambiguous as to whether they rest on state-law or federal-law grounds. Rather than run the risk of improperly reversing a judgment based on state law, we adopted the practice of vacating and remanding so that the state court could make the reasons for its judgment clear. See, *e.g.*, *Minnesota* v. *National Tea Co.*, 309 U. S. 551 (1940); *Department of Mental Hygiene of Cal.* v. *Kirchner*, 380 U. S. 194 (1965).[2]

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[2]In *Michigan* v. *Long*, 463 U. S. 1032 (1983), we largely supplanted this policy with the rule that state-court decisions discussing federal law will be presumed to be based on federal law unless the

We have "GVR'd" with increasing frequency in recent years on the basis of suggestions or representations made by the Solicitor General. Some of these cases are nothing more than examples of the "intervening-event GVR" discussed above, the Solicitor General pointing out that a case or statute has intervened since the judgment below. See, *e.g.*, *Woods* v. *Durr*, 336 U. S. 941 (1949); *Altiere* v. *United States*, 382 U. S. 367 (1966). We have also announced "no-fault GVRs," however, when there has been no intervening development other than the Solicitor General's confession of error in the judgment. That is a relatively new practice. As recently as 1942 a unanimous Court (two Justices not participating) wrote the following:

> "The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent. But such a confession does not relieve this Court of the performance of the judicial function. The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed. . . . Furthermore, our judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of the parties . . . ." *Young* v. *United States*, 315 U. S. 257, 258–259 (1942).

Cf. *U. S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U. S. ___ (1994) (setting aside of a valid judicial judgment should not turn upon agreement of the parties). Many of the early "GVRs" based upon the Government's confession of error appear not to have been "no-fault V&Rs" at all, but rather summary decisions on the merits, with remand for further proceedings. See, *e.g.*, *Chiarella* v. *United States*, 341 U. S. 946 (1951) ("*[u]pon consideration of the record* and the confession of error by the Solicitor General," remanding to the District Court for resentencing) (emphasis added); *Penner* v. *United States*, 399 U. S. 522 (1970) ("[o]n the basis of a confession of error by the Solicitor General and of an independent review of the record," remanding to the District Court "with instructions to dismiss the indictment").

Our recent practice, however, has been to remand in light of the confession of error without determining the merits, leaving it to the lower court to decide if the confession is correct. As late as 1981, the current Chief Justice, joined by Justice White, objected to this practice. See *Mariscal* v. *United States*, 449 U. S. 405, 407 (1981) (REHNQUIST, J., dissenting) ("I harbor serious doubt that our adversary system of justice is well served by . . . routinely vacating judgments which the Solicitor General questions without any independent examination of the merits on our own"). I agree with that position. The practice is by now well entrenched, however. See, *e.g.*, *Reed* v. *United States*, 510 U. S. ___ (1994); *Ramirez* v. *United States*, 510 U. S. ___ (1994). It may be considered a separate category of "no-fault V&R."

Finally (and most questionably) we have in very recent years "GVR'd" where the Solicitor General has *not* conceded error in the judgment below, but has merely acknowledged that the ground, or one of the grounds, on which the lower court relied was mistaken. See, *e.g.*, *Alvarado* v. *United States*, 497 U. S. 543 (1990); *Chappell* v. *United States*, 494 U. S. 1075 (1990). That is in my view a mistaken practice, since we should not assume that a Court of Appeals has adopted a legal position only because the Government supported it.

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contrary is clear from the face of the opinion. *Id.*, at 1037–1044; see also *Arizona* v. *Evans*, 514 U. S. ___, ___–___ (1995) (reaffirming this approach). But cf. *Capital Cities Media, Inc.* v. *Toole*, 466 U. S. 378 (1984) (post-*Long* decision vacating and remanding for clarification of state supreme court decision rendered without opinion).

Four Justices now sitting on the Court have disapproved this sort of "GVR." See *Alvarado*, *supra*, at 545 (REHNQUIST, C. J., joined by O'CONNOR, SCALIA, and KENNEDY, JJ., dissenting).[3]

Today's cases come within none of these categories of "no-fault V&R," not even the questionable last one. In No. 94–8988, the decision "in light of" which we vacate the judgment and remand, *Pioneer Investment Services Co.* v. *Brunswick Associates Ltd. Partnership*, 507 U. S. 380 (1993), had been on the books for well more than a year before the Eleventh Circuit announced the judgment under review, and for almost two years before that court denied rehearing. Moreover, the parties *specifically argued* to the Court of Appeals the question whether *Pioneer* established the standard applicable to petitioner's claim of "excusable neglect" under Federal Rule of Appellate Procedure 4(b), with the United States disagreeing with petitioner and taking the position that *Pioneer* was *not* controlling. The Eleventh Circuit ruled against petitioner on the merits of his claim; its one-sentence order contained neither a reference to *Pioneer* nor any suggestion that the court viewed the case as turning on which party's proffered standard was applied.

The United States has now revised its legal position and—though it makes no suggestion that the Court of Appeals' judgment was incorrect—is of the view that *Pioneer does* establish the standard governing

[3]The Court misdescribes my position when it states that I would limit "GVRs" "based on confessions of error that do not purport to concede the whole case" to "cases in which the confession of error concerns a 'legal point on which the lower court explicitly relied.'" No. 94–9323, at 8 (quoting *infra*, at 9). Both the text above and the sentence immediately following the phrase that the Court quotes from my dissent, see *infra*, at 9, make my position clear. The line of distinction I would draw—and the one long established in our practice—is between a respondent's concession of error *in the lower court's judgment* and a respondent's concession of error that goes not to the judgment but merely to an aspect of the reasoning below or of respondent's argument below.

petitioner's claim. But the fact that the party who won below repudiates on certiorari its position on a particular point of law does not give rise to any "intervening," postjudgment factor that must be considered. The law is the law, whatever the parties, including the United States, may have argued. As described above, we have sometimes "GVR'd" where the Government has, while still supporting the judgment in its favor, conceded the error of a legal point on which the lower court explicitly relied. As I have explained, see *supra*, at 7–8, in my view even that practice denies valid judgments the respect to which they are entitled. But the "GVR" in the present case goes still further. We do not know in this case whether the Eleventh Circuit even *agreed* with the Government's position that has now been repudiated; for all we know, the court *applied Pioneer* and found against petitioner under that standard. The judgment is declared invalid because the Eleventh Circuit *might* (or might not) have relied on a standard (non-*Pioneer*) that *might* (or might not) be wrong, that *might* (or might not) have affected the outcome, and that the Eleventh Circuit *might* (or might not) abandon (whether or not it is wrong) because the Government has now abandoned it. This seems to me beyond all reason.

The Court justifies its setting aside of the judgment on the ground that "we [do not] place an excessive burden on [the Eleventh Circuit], relative to [petitioner's] liberty and due process interests, by inviting it to clarify its ambiguous ruling." No. 94–8988, at 3. Vacating for ambiguity may be justifiable, as I have noted, when the ambiguity calls into question our very power to take and decide the case, see *supra*, at 5, and n. 2. But where that power is (as it is here) beyond doubt, it seems to me quite improper to vacate merely in order to get a better idea of whether the case is "worth" granting full review. If this is appropriate with respect to court of appeals' summary dispositions of criminal cases, I see no reason why it is not appropriate with respect to criminal dispositions accompanied by opinions as well. Or, for

that matter, why it is not appropriate for civil cases. "GVR'd for clarification of _____" should become a common form of order, drastically altering the role of this Court. In my view we have no power to make such a tutelary remand, as to a schoolboy made to do his homework again.[4] The Court insists that declining to remand for clarification would risk "immunizing summary dispositions . . . from our review," No. 94–8988, at 3. That is not so. It is fully within our power to review this case, and any other case summarily decided below, by granting certiorari and proceeding to consider the merits; or indeed, where the circumstances warrant, to summarily reverse. Cf. Hellman, "Granted, Vacated, and Remanded"—Shedding Light on a Dark Corner of Supreme Court Practice, 67 Judicature 389, 391–392 (1984) (noting that in the 1970's as the Court's "GVR" practice "increased far beyond what it had been in earlier years," its use of summary reversal based on intervening precedents decreased dramatically).

In No. 94–9323, the Court again "GVRs" because the Government has changed a legal position: the Commissioner of Social Security informs us that she now agrees with petitioner on a preliminary point of law that the Court of Appeals found in the Government's favor. And here again, respondent does not concede that the judgment below was in error, for she "ha[s] not . . . reached a firm conclusion" as to her position on the subsequent point of law that will (if her recantation on the preliminary point is accepted) control the outcome of the case. Brief for Respondent in No. 94–9323, p. 13.[5]

[4] *Netherland* v. *Tuggle*, 515 U. S. ___ (1995), upon which the Court relies, see No. 94–9323, at 6–7, is not to the contrary. That was not a "no-fault V&R," but a reversal of the lower court for abuse of discretion in its entry of a stay order.

[5] Because the Commissioner is not prepared to say that she disagrees with petitioner as to the proper disposition of this case, it is questionable whether any case or controversy subsists. Quite apart from the other difficulties with the course the Court has chosen, it seems to me we should not permit the Commissioner to trouble the Fourth Circuit again until she makes up her mind on this issue.

There is, however, a special factor in this second case: respondent is an agency head, whose view on the legal point in question is in some circumstances entitled to deference, see *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). If it were clear that respondent's change in position were entitled to deference, I would have no problem with the "GVR"; the new position would then constitute an intervening postjudgment factor whose effect the Court of Appeals should be allowed to consider. But even if we allow deference to an agency view first expressed in pending litigation (as some think we should not, see Anthony, Which Agency Interpretations Should Bind Citizens and the Courts?, 7 Yale J. Reg. 1, 60–61 (1990); cf. Merrill, Judicial Deference to Executive Precedent, 101 Yale L. J. 969, 1023 (1992)), surely a decent concern for those litigating against the Government and for our lower court judges should induce us to disregard, for *Chevron* purposes, a litigating position *first expressed at the certiorari stage*. The United States is the most frequent, and hence the most calculating, of our litigants. If we accord deference in the circumstances here, we can expect the Government to take full advantage of the opportunity to wash out, on certiorari, disadvantageous positions it has embraced below; and we can expect it to focus less of its energy upon getting its position "right" in the Courts of Appeals.

The Court, however, thinks it unnecessary to decide the deference question. It is enough, [illegible] the Court sees it, that its summary review has led it to "believe that [the] agency interpretation is reasonably probably entitled to deference and potentially determinative." No. 94–9323, at 9. I do not agree. It seems to me our "intervening-event GVRs" should not be extended to the situation where (1) the intervening event consists of a

party's going back on what it argued to the court of appeals, *and* (2) it is not even certain that the change in position is legally cognizable. That seems to me to accord inadequate respect to the work of our colleagues below. Moreover, it is not clear to me that the question before us (should an agency change of position at the certiorari stage be accorded deference?) *can even be reached* by the Court of Appeals. Surely we do not expect the Court of Appeals to declare our vacation and remand invalid. Thus, the Court of Appeals will have before it the somewhat *different* question whether the agency change of position *before it* is entitled to deference. I suppose it may conclude that, *since* a change of position on certiorari is not entitled to deference, a change of position on a remand triggered by change of position on certiorari is not entitled to deference—but that would assuredly be a convoluted holding. The question of what is permissible on certiorari seems to me peculiarly within the domain of this Court. Since we are in doubt on the deference point in the present case, we should either deny the petition, or grant it and have the deference point argued.

The Court's failure to comprehend why it should make any difference that the Government's changed litigating position may not be entitled to deference, see No. 94–9323, at 9, displays a lamentable lack of appreciation of the concept of adding insult to injury. It is disrespectful enough of a lower court to set its considered judgment aside because the Government has altered the playing field on appeal; it is downright insulting to do so when the Government's bait-and-switch performance *has not for a certainty altered any factor relevant to the decision*. In that situation, at least, we should let the Government live with the consequences of its fickleness or inattention. The Court claims that it would "defeat the purpose of GVR'ing" to determine the deference issue on the merits, since that issue is "based on a circumstance . . . that will not be present in any other case brought under the statute at issue." *Ibid*. That is true

enough (barring the unlikely event that the Government in a later case under this very statute again switches its position at the certiorari stage). But the issue of whether *Chevron* deference should be accorded to a certiorari-stage switch of litigating position is not at all unique to the individual case or bound up with the underlying statute. It always arises, of course, in an individual case involving a particular statute, as do most questions of law. But the issue itself is thoroughly generalizable, and of general importance. In any event, I do not urge that we determine the deference issue on the merits; my vote in these cases is to deny the petitions. Finally, I must remark upon the Court's assertion that we issued "just such a GVR order last Term, without recorded dissent," No. 94–9323, at 10, citing *Schmidt* v. *Espy*, 513 U. S. ___ (1994): It is not customary, but quite rare, to *record* dissents from grants of certiorari, including "GVRs." It would be wrong to conclude from the unsigned order in *Schmidt* that the vote to "GVR" was unanimous, or even close to unanimous. Thus, *Schmidt* does not demonstrate that bait-and-switch-deference "GVRs" are an accepted practice; but the fact that *Schmidt* was apparently the first-ever such "GVR," combined with the fact that the Government is back one Term later for another helping, demonstrates the accuracy of my prediction that the Solicitor General will be quick to take advantage of this new indulgence.

What is more momentous than the Court's judgments in the particular cases before us—each of which extends our prior practice just a little bit—is its expansive expression of the authority that supports those judgments. It acknowledges, to begin with, no constitutional limitation on our power to vacate lower court orders properly brought before us. No. 94–9323, at 3. This presumably means that the constitutional grant of "appellate Jurisdiction" over "Cases . . . arising under [the] Constitution [and] Laws of the United States," Art. III, §2, empowers the Court to vacate a state supreme

court judgment, and remand the case, because it finds the opinion, though arguably correct, incomplete and unworkmanlike; or because it observes that there has been a postjudgment change in the personnel of the state supreme court, and wishes to give the new state justices a shot at the case. I think that is not so. When the Constitution divides our jurisdiction into "original Jurisdiction" and "appellate Jurisdiction," I think it conveys, with respect to the latter, the traditional accoutrements of appellate power. There doubtless is room for some innovation, particularly such as may be necessary to adapt to a novel system of federalism; but the innovation cannot be limitless without altering the nature of the power conferred.

Not only does the Court reject any constitutional limitation upon its power to vacate; it is unwilling to submit to any prudential constraint as well. Even while acknowledging the potential for "unfair[ness] or manipulat[ion]" and professing to agree that "our GVR power should be exercised sparingly," No. 94–9323, at 4, 10, the Court commits to no standard that will control that power, other than that cloak for all excesses, "the equities," *id.*, at 4; see *id.*, at 10, 11–12; No. 94–8988, at 3. We may, as the Court now pronounces, set aside valid judgments not merely when they are wrong, not merely when intervening events require that someone (either the lower court or we) reconsider them on new facts or under new legal criteria, not merely when it is ambiguous whether we have power to review them, not merely when the United States concedes that the judgment below (or one of the points of law relied upon below, or even one of the points of law *possibly* relied upon below) is wrong; but whenever there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." No. 94–9323, at 4. The power to "revis[e] and correc[t]" for error, *Marbury* v. *Madison*, 1 Cranch 137, 175 (1803), has become a power to void for suspicion. Comparing the

modest origins of the Court's "no-fault V&R" policy with today's expansive *dénouement* should make even the most Pollyannish reformer believe in camel's noses, wedges, and slippery slopes.

The Court justifies its approach on the ground that it "alleviates the potential for unequal treatment that is inherent in our inability to grant plenary review of all pending cases raising similar issues." No. 94–9323, at 4 (internal quotation marks omitted). I do not see how it can promote equal treatment to announce a practice that we cannot possibly pursue in every case. If we were to plumb the "equities" and ponder the "errors" for all the petitions that come before us—if we were to conduct, for example, in all cases involving summary decisions, today's balancing of the "burden" to the Court of Appeals against the litigant's "interests" in having clarification of the ruling, see No. 94–8988, at 3, or today's calculation of "the overall probabilities and equities," No. 94–9323, at 10—we would have no time left for the cases we grant to consider on the merits. Of course we do not *purport* to conduct such inquiries, not even the basic one of whether the decision below is probably in "error"—which is why we insist that our denial of certiorari does not suggest a view on the merits, see, *e.g.*, *Teague* v. *Lane*, 489 U. S. 288, 296 (1989); *Singleton* v. *Commissioner*, 439 U. S. 942 (1978) (STEVENS, J., respecting the denial of the petition for writ of certiorari). Moreover, even if we tried applying the Court's "totality-of-the-circumstances" evaluation to all the petitions coming before us, we would be unlikely to achieve equal treatment. Such a plastic criterion is liable to produce inconsistent results in any series of decisions; it is virtually *guaranteed* to do so in a series of decisions made without benefit of adversary presentation (whether we should "GVR" is rarely briefed, much less argued—as it has not been here) and announced without accompaniment of a judicial opinion (we almost never give reasons as the Court has done today). The need to afford equal treatment argues precisely *against*

the "totality-of-the-circumstances" approach embraced by the Court, and in favor of a more modest but standardized "GVR" practice.

Henceforth, I shall vote for an order granting certiorari, vacating the judgment below without determination of the merits, and remanding for further consideration, only (1) where an intervening factor has arisen that has a legal bearing upon the decision, (2) where, in a context not governed by *Michigan* v. *Long*, 463 U. S. 1032 (1983), clarification of the opinion below is needed to assure our jurisdiction, and (3) (in acknowledgment of established practice, though not necessarily in agreement with its validity) where the respondent or appellee confesses error in the judgment below. (I shall not necessarily note my dissent from "GVRs" where those conditions do not exist.) As I have discussed, neither of the present cases meets these standards. Accordingly, I respectfully dissent from today's orders and would deny both petitions.